Criminal Liability for Serious Traffic Offences

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Essays on Causing Death, Injury and Danger in Traffic

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Preface

This book, which is part of the Netherlands Institute for Law and Governance Series, is the result of an international conference on criminal liability for serious traffic offences held on 7 September 2012 in Groningen, The Netherlands.

We would like to thank most warmly Marie-Aimée Brajeux, Karel Brookhuis, Manuel Cancio Meliá, Marius Duker, Roberto Flor, Ingke Goeckenjan, Marc Groenhuijsen and Sally Kyd Cunningham for their stimulating contributions to the conference.

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The criminal law on serious traffic offences is a fascinating area, which has not received as much attention as it deserves. This book aims to fill that void. We believe it contains valuable insights for legal scholars, legislators and members of the judiciary all over the world.

July 2014

Alwin van Dijk
Hein Wolswijk

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Chapter 1

The Complex Nature of Serious Traffic Offences

*Alwin van Dijk and Hein Wolswijk**

1.1 Introduction

This collection of essays is devoted to criminal liability for serious traffic offences. We will not attempt to provide an exact, universally valid definition of what constitutes a serious traffic offence. In general, a serious traffic offence is an offence that is aimed at behaviour that is so serious that a strong censure, such as a custodial sentence or a driving disqualification, might be called for. The best available indicator of seriousness, although it is far from perfect, is the maximum punishment that the legislator has assigned to an offence. Offences dealing with causing a severe result, offences pertaining to causing a concrete danger and some abstract endangerment offences typically fit the bill.

Chapters 2 through 6 of this book deal respectively with serious traffic offences in the Netherlands, England and Wales, France, Germany and Spain. Chapters 7, 8 and 9 deal with general issues which are relevant to serious traffic offences. The authors elaborate respectively on the role of culpability and harm with respect to punishment severity, traffic-psychological insights that are relevant to accident causation and the concept of conditional intent in relation to extremely dangerous traffic behaviour.

If the contributions in this book show anything, it is that the subject of serious traffic offences is exceptionally complex. The first reason is that legislators in the traffic context face quite a few complex legislative choices. The second reason is that the traffic context has the tendency to generate hard cases that call the outermost boundaries of essential doctrinal concepts into question. In Sections 1.2 and 1.3, we will discuss some of the legislative and interpretative complexities. In Section 1.4, we provide a brief outline of the book.

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1.2 The Complex Legislative Choices Underlying the Criminalization of Serious Traffic Offences

1.2.1 The Many Variables Involved in Drafting Serious Traffic Offences

The legislator devising a system of serious traffic offences faces quite a lot of complex legislative choices. The drafting of serious traffic offences revolves around three major questions: what *actus reus* is required, what kind of *mens rea* regime should apply and what penalties should be assigned? These are of course familiar questions, which apply to all cases of criminal law drafting. It would appear, however, that there are more variables to consider with respect to each of these questions than in other contexts.

The main legislative tools with respect to the *actus reus* are result offences, concrete endangerment offences and abstract endangerment offences, as well as the use of special constituent or aggravating factors. With respect to the result offences, the question is what kind of results should incur liability. Since an enormous amount of traffic collisions take place, it is practically feasible to differentiate between the different results flowing from a collision. Should death, severe bodily injury, simple injury or damage incur liability for a result offence? Another characteristic of the traffic context is that there is an elaborate network of specific conduct rules the road user has to obey. The most serious rule violations might also surface in the domain of serious traffic offences. They can be serious traffic offences themselves (e.g. drink-driving or extreme speeding), they can be used as specifications of concrete endangerment offences (e.g. overtaking improperly or driving backwards), or they can be constituent or aggravating factors of result offences (e.g. being uninsured or not cooperating with an alcohol test).

The second important question concerns the *mens rea* regime that should apply. Should the offence, or part thereof, require proof of a *mens rea* form such as intent, recklessness or negligence? Other options are the creation of strict liability or allowing only a defence vis-à-vis the absence of culpability. The traffic context provides ample room to differentiate between different levels of blameworthiness. The millions of interactions that take place in traffic ensure that results, dangers and conduct violations are coupled to all possible levels of blameworthiness. It is up to the legislator to set the minimally required blameworthiness for an offence and to determine whether it is sensible to differentiate once this threshold is met.

It should be clear that the many possibilities to draft serious traffic offences can give rise to a colourful array of offences. It is for the legislator to determine the penalties that are attached to the various offences. An important theme is the determination of the maximum punishment for an offence. The relevance of the maximum punishment is not limited to the maximum that can actually be imposed by a court. In practice, sentences tend to be much lower than the available maximum punishment. Nevertheless, the maximum punishment generally provides a good indication of how the legislator rates the seriousness of the offence in relation to other offences. This expression of relative seriousness provides guidance to courts as to what kinds of sentences are appropriate for typical manifestations of a certain offence. Another important punishment theme, at

least in some criminal law systems, is the determination of minimum penalties. In this way, the legislator is able to exert more control over the actually imposed penalties. The last important punishment theme concerns the mode of punishment. In the traffic context, there are more penalties to consider than the common penalties of imprisonment, fines and community service. There are quite a few potential penalties that are specifically tailored to the traffic context, such as a driving disqualification, confiscation of a vehicle, rehabilitation courses for road users, driver's licence demerit points, speed locks or alcolocks.

1.2.2 Some Essential Legislative Issues

The many possibilities for variation with respect to *actus reus*, *mens rea* and punishment show that the legislator can deal in a lot of different ways with dangerous or potentially dangerous traffic behaviour. It should come as no surprise, therefore, that the criminal law systems examined in this book have made very different legislative choices in that respect. We will briefly address five important issues that legislators in the traffic context encounter. These issues account for the most significant differences between the examined systems.

The first issue pertains to a difficult normative question. How should the legislator deal with cases where low culpability behaviour leads to severe consequences? Criminal traffic offences are set apart from conventional criminal offences in that they are generally not committed by hardened criminals. Many serious traffic accidents are caused by fairly ordinary people who – at least up to that moment – were perceived as well-meaning human beings. Once the criminal law has set its sights on these ordinary people, they may face penalties that are otherwise reserved for the most heinous crimes. The most challenging cases in traffic law are those in which severe consequences (e.g. the death of a child) are matched with low moral culpability. Whether or not such behaviour warrants liability for an offence with respect to causing the result depends on the minimally required level of blameworthiness. From an objective point of view, the question is what deviation from the reasonable man standard is required. Is a small deviation from the objective standard already enough to create criminal liability? From a subjective point of view, the question is whether below-average mental and physical capabilities should be taken into account. Does the fact that a defendant, given his mental and physical capabilities, could not have met the required objective standard negate liability for causing the severe result? It should be noted that the minimally required level of blameworthiness in a system may to a large extent be determined by the courts. However, the leading role of the legislator is patently clear in England and Wales, where the legislator in 2008 created an offence of causing death by careless driving, which seems to require only a small deviation from the reasonable man standard.

The second issue is how legislators should deal with cases where highly culpable behaviour leads to actual danger, but not to a severe result. How should the criminal law cope with a driver who nearly kills another person in the process of undertaking a highly dangerous overtaking manoeuvre? Criminal law systems struggle with such questions. In systems that focus primarily on consequences,

such behaviour may well be labelled as a trivial offence. In the Netherlands, for example, the concrete endangerment offence of causing danger on the road only amounts to a misdemeanour (as opposed to a felony) with a two-month maximum prison term. As the misdemeanour requires not even proof of *mens rea*, it is not well suited to deal with highly culpable and dangerous traffic behaviour. In Germany and Spain, however, highly culpable traffic behaviour causing danger might lead to liability for a concrete endangerment offence that has a maximum punishment which is no less than thirty times higher.

The third issue is how to deal with cases where conduct that typically creates an unjustifiable risk does not lead to actual danger. Such conduct might be dealt with on the basis of abstract endangerment offences. In such offences, the offence definition does not specify the dangers or harmful consequences that justify their criminalization. In most criminal law systems, driving under the influence of alcohol or drugs is labelled as a serious offence, since it carries a substantial penalty. The legislator faces some difficult choices in this regard. Should the offence set a behavioural standard, such as being unfit to drive, or should the law specify a certain level in blood, breath or urine? German criminal law employs a behavioural standard with regard to driving under the influence of alcohol or drugs. Fixed levels only have a place in an administrative offence. In quite a few other countries, however, fixed levels are part of a criminal offence. In that case, the obvious question becomes what level should be set. In England and Wales, the blood alcohol concentration is set at 0.08%. In the Netherlands, a level of 0.05% (or 0.02% for novice drivers) suffices. The Dutch legislator is currently considering to set fixed levels for several kinds of drugs as well. In most criminal law systems, other abstract endangerment offences in traffic, such as speeding, are not threatened with a serious penalty. In many cases, they are even dealt with under administrative law. In Spain, however, exceeding the speed limit by sixty km/h in urban streets or by eighty km/h on non-urban roads is a criminal offence which is threatened with a term of imprisonment between three and six months.

A fourth important issue concerns the question of whether the legislator should differentiate between different levels of blameworthiness when either a grave consequence or danger is caused. In Germany, all inadvertent behaviour resulting in death or serious bodily injury is brought under the same *mens rea* term (negligence). In the Netherlands, the maximum punishments for causing death and causing serious bodily injury are doubled in case of recklessness (as opposed to 'plain' negligence), which can be defined as extremely negligent behaviour. This can be contrasted with the respective concrete endangerment offences. In the Netherlands, the offence of causing danger on the road requires neither proof of intent nor of negligence. Liability is only negated if the court holds that a defence, such as 'absence of all culpability', applies. In Germany, on the other hand, the much more serious endangerment offence differentiates between intentionally and negligently causing the danger.

The fifth important issue for the legislator to consider is to what extent the law should be tailored specifically to the traffic context. In some countries, there is a specific offence for negligently causing a result in traffic. In the Netherlands

and France, the maximum punishment for the negligent traffic offence is much higher than that of the general negligent offence. In Germany and Spain, however, negligent behaviour in traffic is covered by the general negligent offences. Another way to tailor offences to the traffic context is to identify specific conduct, such as speeding, drink-driving or not yielding right of way, with regard to concrete endangerment offences. Germany and Spain provide examples of that. Yet another way to incorporate the traffic context is to identify aggravating or constituent factors with respect to the negligent result offences. In the Netherlands and France, aggravating factors such as intoxication, severe speeding or not cooperating with an alcohol test bring about a substantial increase in the maximum punishment. In England and Wales, there are two result offences with special constituent factors: causing death by careless driving whilst under the influence of drink or drugs, and causing death by driving whilst uninsured, unlicensed or disqualified.

1.2.3 Conclusion

This section has identified some of the complex normative and technical issues that underlie the criminalization of serious traffic offences. One would be hard-pressed to find another area of the criminal law where there are so many possibilities for variation. As such, it is no wonder that each of the countries examined in this book has ended up with an altogether different array of offences dealing with dangerous or potentially dangerous traffic behaviour. It seems to us that this conclusion provides food for thought. How come that systems that are comparable to each other in quite a few ways have taken vastly different paths in this area? The legislators of these and other countries would be well advised to evaluate the choices underlying their systems in light of the many available options in this area.

1.3 The Complex Interpretative Questions Emerging in Traffic Cases

The serious offences that are dealt with in this book are confined to the context of road traffic. However, the relevance of serious traffic offences is by no means limited to the traffic context. One of the fascinating aspects of this area of criminal law is that general doctrinal concepts are very much at the centre of attention. The millions of dynamic interactions that take place in traffic have a tendency to spawn interesting cases that call the outermost boundaries of essential doctrinal concepts into question. We will demonstrate this on the basis of three landmark cases in Dutch criminal law. These cases pertain to the lower boundary of intent, negligence and causation. These cases also demonstrate that the role of the courts is at least as important as the role of the legislator. As far as the interpretation of general doctrinal concepts goes, the legislator can typically not exert all that much influence. It is up to the courts to determine in more detail how the lower boundaries of the opaque general concepts are defined.

One of the most important Dutch cases with respect to the concept of intent is the Porsche case.[1] After getting drunk in several bars, the defendant and his friend embarked on a perilous journey in a Porsche. The Porsche turned corners with squeaking and burning tyres, travelled at excessive speeds and ran red lights with undiminished speed. Subsequently, the driver approached several cars very closely and then overtook them with a swift manoeuvre. Finally, the driver tried to overtake a Seat. After having aborted three overtaking attempts, the Porsche went to the other lane and collided head-on with an oncoming Volvo. The Volvo's four occupants and the defendant's friend died as a result of this crash. The Court of Appeal had convicted the defendant of intentional homicide on the basis of conditional intent, which can be defined as consciously accepting the substantial chance of causing the result. The Dutch Supreme Court quashed this conviction. The Court essentially raised the question of how the finding of conditional intent to kill *another person* could be reconciled with the foreseeable and undesirable prospect of the defendant's *own death* as a result of the collision.

The Porsche case raises both conceptual and practical questions. From a conceptual point of view, the question is how the boundary between conditional intent and conscious negligence is to be drawn. The relevance of this question goes well beyond the context of traffic law. From a practical point of view, the question is whether extremely dangerous traffic behaviour does in fact result in proof of conditional intent. In the Netherlands, this happens quite frequently, the Porsche case notwithstanding. It is interesting to assess how systems with a similar concept of intent, such as Germany and Spain, deal with comparable cases.

Another important Dutch case, which concerns the lower boundary of negligence, is the Geervliet case.[2] The defendant came from a gas station in the city of Geervliet and wanted to drive on to the adjoining road, which had an 80 km/h speed limit. The road was clearly marked with give-way road markings. The defendant brought his car to a near-stop and looked over his left shoulder to check for oncoming traffic. He did not see any traffic and went on his way. After about twenty metres, a motorcycle bumped into his left rear side. The motorcyclist sustained serious bodily injury because of this. The Court of Appeal convicted the defendant of negligently causing severe bodily injury in traffic, but the Supreme Court quashed the verdict. According to the Supreme Court, the mere fact that the defendant, when he was checking for oncoming traffic, did not see the motorcyclist although the motorcyclist must have been visible to him, is not sufficient to establish negligence.

Legal scholars in the Netherlands debate amongst one another how this case is to be interpreted. Some scholars argue that lower courts can still convict in cases like this as long as they properly substantiate why the defendant acted negligently. Other scholars disagree, claiming that the Supreme Court gave a clear signal that momentary inattention is just not enough to establish negligence. This controversy touches upon the fundamental question of what level of culpability is minimally required for criminal responsibility. It is interesting to assess how other

1 Supreme Court 15 October 1996, ECLI:NL:HR:1996:ZD0139.

2 Supreme Court 29 April 2008, ECLI:NL:HR:2008:BD0544.

systems deal with such cases of momentary inattention. It would seem that lethal cases of momentary inattention in England and Wales can be brought quite easily under the definition of causing death by careless driving, where it is only required that the way the defendant drove fell below what would be expected of a competent and careful driver. This can be contrasted with the standard that applies in cases where only serious injury has resulted. Here, it has to be proved that the way the defendant drove fell *far* below what would be expected of a competent and careful driver (dangerous driving).

The last Dutch case concerns the criterion for establishing a causal connection.[3] The defendant in this case failed to yield right of way to the driver of another vehicle. A passenger of the other vehicle sustained a skull fracture and a concussion. In the hospital, the victim developed thrombosis on account of the injuries and the necessary bed rest. The thrombosis gave rise to a pulmonary embolism, which eventually resulted in the victim's death twelve days after the collision. The medical examiner's report stated that the victim's injuries had been serious, but that these injuries should not necessarily have resulted in the victim's death. The Court of Appeal convicted the defendant of negligently causing the death of the victim. The defendant's attorney argued before the Supreme Court that there was no causal connection between the collision and the victim's death. The attorney raised the question of whether medical mistakes might have been made. The Supreme Court left the conviction intact. According to the Court, the occurrence of a lethal pulmonary embolism after injuries resulting from a collision "is not of such a nature that the victim's death could not be reasonably attributed to the defendant as a result of the collision". The Supreme Court introduced the new causal criterion of the 'reasonable attribution', which came into place of the previously used foreseeability criterion. This criterion has been in use ever since and has developed into the prevailing standard throughout the criminal law.

It is no wonder that the general doctrinal concept of causation is tested to the limit in the traffic context. A first reason is that the interactionist nature of traffic brings in its wake that often more than one person is involved in the causal chain. This raises the question of when contributory fault negates criminal responsibility of the defendant. A second complexity with respect to causation is that it may not be easy to establish 'but for' or *sine qua non* causation between careless or dangerous driving (e.g. drink-driving or speeding) and the collision. Might the collision not also have occurred if the defendant had played by the rules? A third source for causal complexities has to do with the simple fact that a great many people sustain injuries in traffic. Some of these injured people are bound to die on account of processes that are not foreseeable in a specific case. The Dutch Supreme Court essentially removed any doctrinal barrier to establishing causation by introducing a rather empty criterion. The contributions about France and England and Wales demonstrate, however, that courts still struggle with difficult questions about causation.

The interesting cases emerging in the traffic context raise important and complex interpretative questions whose relevance extends well beyond this context.

3 Supreme Court 12 September 1978, ECLI:NL:HR:1978:AC2616.

As a rule, it is up to the courts, rather than the legislator, to define the lower boundaries of the opaque general concepts. The comparative chapters show that the courts of the examined countries interpret similar concepts such as conditional intent, negligence or causation in a different manner. If anything, this demonstrates that the realm of possible interpretations is quite extensive. The courts of these and other countries would do wisely to evaluate their interpretative choices in light of the other available options in this area.

1.4 Outline

Chapters 2 through 6 of this book are devoted to the law of several European countries. Hein Wolswijk (the Netherlands), Sally Kyd Cunningham (England and Wales), Marie-Aimée Brajeux (France), Ingke Goeckenjan (Germany), and Manuel Cancio Meliá and Mariona Llobet Anglí (Spain) provide an analysis of serious traffic offences in the respective countries. As was explained in the previous sections, these chapters reveal that there are significant differences in drafting and interpretation of serious traffic offences. The authors do not only provide a description of the relevant provisions and case law of the examined systems, but they also offer critical and constructive observations with respect to essential legislative and interpretative choices.

Chapters 7, 8 and 9 deal with specific issues in the traffic context. Marius Duker examines the relative importance of culpability and harm in the sentencing of serious traffic offences in the Netherlands and England and Wales. He compares both the maximum punishments and the actual punishment practice of these two systems. He argues that both systems make a disproportionate difference between the punishment handed out for endangerment offences on the one hand and result offences on the other hand. Karel Brookhuis examines traffic offences from a behavioural perspective. He takes a closer look at the human factor in the causation of traffic accidents. He argues that drivers are sometimes unjustly blamed for causing a traffic accident, because the accidents should really be attributed to human limits. Alwin van Dijk provides a conceptual and psychological analysis of conditional intent and conscious negligence in the traffic context. The conceptual part contains a cognitivist and volitionist analysis of the legal concept of intent. The psychological part introduces a psychological framework (Desirability Maximization Theory) which might serve as a general framework for analysing extremely dangerous traffic behaviour.

Chapter 2

Serious Traffic Offences: The Dutch Perspective

*Hein Wolswijk**

2.1 Introduction

In this chapter, Dutch substantive law regarding serious traffic offences will be discussed.[1] The focus will be on the definitions of the offences and the accompanying maximum prison terms.[2] Under Dutch law, traffic offences can be divided into the following groups. The first group concerns conduct offences involving no direct harm to persons. To this group belong, amongst others, minor offences consisting of violations of concrete provisions relating to speed limits, yielding right of way, etc. This group also includes the general offence of causing danger on the road and the offence of driving under the influence of substances compromising driving ability. The second group concerns negligent result offences, and encompasses essentially just one offence, namely negligently causing a traffic accident in which another person is killed or sustains serious bodily injury. Finally, there is the group of general intentional offences, like intentional homicide and intentionally causing serious bodily injury (and the attempt thereto).

I will give an overview of these groups of offences (Section 2.3). Subsequently, the focus will be on the negligent traffic offence (Sections 2.4 and 2.5). Both from a theoretical and a practical viewpoint, this is the most important specific traffic offence. It raises a number of questions, particularly regarding the lower limit of negligence in traffic. At the end, I will discuss some possible gaps in Dutch criminal traffic law (Section 2.6). But I will start out by providing some relevant background information on the Dutch legal system in general.

2.2 Some General Characteristics of Dutch Criminal Law[3]

Dutch criminal law classifies criminal offences as either felonies or misdemeanours. In the case of felonies, some kind of *mens rea* (intent or negligence; *see* below) must always be proved. Misdemeanours are less serious offences. The maximum penalty never exceeds one year of imprisonment. Most misdemeanours require no *mens rea*; only the *actus reus* needs to be proved.

* Hein Wolswijk is Professor of Criminal Law at the University of Groningen, The Netherlands.

1 All articles and quotations are translations into English by the author.

2 The sentencing practice is discussed extensively by Duker, this book, Chapter 7.

3 Tak 2008 provides a helpful introduction into Dutch criminal law in English.

The requirements for liability for an offence, be it a felony or a misdemeanour, can be distinguished into the specific constituent (definitional) elements of the offence and general requirements, namely unlawfulness and blameworthiness (culpability). A person who has fulfilled the constituent elements of an offence is not criminally liable if he did not act unlawfully, i.e. he can successfully plead a ground of justification, for example acting in self-defence. Criminal liability may also be lacking because the perpetrator, although acting unlawfully, is not to blame for this act because of an excusatory ground, like a mental disorder. This three-staged structure – definition of the offence, unlawfulness and blameworthiness – is the standard. As will be demonstrated further on, negligent offences deviate from this structure.

All defences may be invoked with respect to *all* offences; no single offence is excluded. That is why misdemeanours, although *mens rea* need not be proved, cannot be classified as absolute liability crimes. A defence that is highly relevant for traffic law is the excuse of 'absence of all culpability'. This is a non-codified, case law-recognized excusatory ground. It is based on the fundamental principle of Dutch criminal law that says that there can be no punishment without guilt. Absence of all culpability serves as a kind of safety net: the defence offers a way out in those cases in which guilt is lacking, while a statutory defence does not apply, for example in case of an excusable mistake of fact.

The distinction between constituent elements and other requirements of liability has an important procedural counterpart: with regard to the charge, which includes only the constituent elements, Dutch criminal law requires that the court must be *convinced* that the offender has committed the offence as charged (Article 338 of the Dutch *Wetboek van Strafvordering* (Code of Criminal Procedure; hereafter CCP). For acquittal on the grounds of justification or excuse, a lower standard of proof applies; one could say that the applicability of such a ground must be *probable*. With regard to justificatory and excusatory defences, the defendant has neither a burden of production nor a burden of persuasion, although, in practice, such a defence is normally raised by the defendant. But the court has – *ex officio* – a duty to ascertain whether a defence might apply.

A final remark should be made on the large discretion on the part of the prosecution office and the courts. Under Dutch law, it is up to the public prosecution office to decide whether or not to charge a person with an offence (Articles 167 and 242 CCP). The prosecution office is not obliged to charge a suspect, even if they strongly believe that an offence has been committed. They can decide on a waiver of prosecution if it is not in the public interest to prosecute (opportunity principle). Victims or other concerned parties are not allowed to bring charges.[4] The law also affords courts a great deal of discretion. This is apparent in numerous areas. For example, although courts are bound by the law, i.e. statutory law, as a result of the principle of legality, many basic general concepts, like intent and negligence, are not statutorily defined, but worked out by the courts on a case-by-case basis. Discretion is most evident with regard to sentencing: Dutch criminal

4 They have the right, however, to request the court to order the prosecution service to bring charges (Article 12 CCP).

law establishes specific *maximum* punishments for each offence, but no specific *minimum* punishments. For example, with regard to imprisonment, a general minimum prison sentence of one day applies to all offences (Article 10.2 *Wetboek van Strafrecht* [Criminal Code; hereafter CC]).[5] This is the case for even the most serious crimes subject to the highest maximum punishment (life imprisonment), such as murder, with judges being allowed to take extenuating circumstances into account.[6]

2.3 An Overview of Dutch Criminal Traffic Law

I will start the overview of Dutch traffic law with the offences involving no direct harm; then the intentional offences will be discussed. The negligent traffic offence, which is to be placed between these groups as regards severity, will be dealt with at the end, the reason being that its reach and its place within the system of traffic offences are best understood after the concept of intent has been explained.

2.3.1 Traffic Offences Involving No Harm (Conduct Offences)

Specific Traffic Regulations

The Dutch legislator has regulated traffic behaviour primarily by specific traffic rules and traffic signs. Most of these rules are laid down in the *Reglement Verkeersregels en Verkeerstekens* (Road Traffic and Traffic Signals Regulations; hereafter RTTSR). These specific, concrete rules concern, for example, speed limits and yielding right of way. From these rules, road users can directly infer how they have to behave in traffic. Violation of such a rule can be characterized as an abstract endangerment offence. The reason for criminalizing certain conduct lies, of course, in the fact that this may easily lead to endangerment of traffic safety, but endangerment itself is not a definitional element of the offence. Absence of endangerment of traffic safety, let alone absence of an actual breach of the protected interest, does not in any way affect the perpetrator's liability. Violation of these specific traffic rules constitutes a misdemeanour.[7] The maximum penalty is generally a penal custody of two months (or a fine).[8]

5 Where the court deems it advisable, it may even determine that no sanction shall be imposed (Article 9a CC).

6 The judiciary has developed 'orientation points' for sentencing. They offer type-descriptions of common crimes indicating what sentence to impose. These non-binding orientation points are fairly influential in practice. They will be discussed in detail by Duker, this book, Chapter 7.

7 A lot of these violations, however, are dealt with by administrative law in accordance with the *Wet administratiefrechtelijke handhaving verkeersvoorschriften* (Traffic Regulations Administrative Enforcement Act) and punished with an administrative fine (*see*, in particular, Article 2 of this Act).

8 A few misdemeanours carry a maximum prison term of three months or a fine.

General Traffic Provision

Next to the specific rules, conduct on the road is also covered by the general rule of Article 5 of the *Wegenverkeerswet 1994* (Road Traffic Act 1994; hereafter RTA): "Anyone is forbidden to behave in such a way that danger on the road is caused or can be caused or that the traffic on the road is hindered or can be hindered." This provision aims to protect traffic safety and fluency of traffic and contains the basic norm for traffic behaviour. It serves as a safety net with regard to any reprehensible behaviour that is not covered by the specific traffic rules. Article 5 RTA functions also as a possible backup indictment if the defendant is charged with Article 6 RTA, negligently causing a traffic accident resulting in death or serious bodily injury. If the court does not establish a violation of Article 6 RTA, for example because the defendant did not act negligently or because the injury was not serious enough, the defendant may be convicted for the lesser offence of Article 5 RTA.

Article 5 RTA is a very broad provision, covering not only actual danger and hindrance, but also potential danger and potential hindrance. Because of its 'openness', Article 5 has been criticized by some authors as being a violation of the legality principle. However, the prevailing view is that since it is impossible for the legislator to describe and prohibit exhaustively all possible forms of dangerous traffic behaviour in specific, concrete rules, such a general provision is indispensable.[9]

Like the violation of the specific, concrete traffic provisions, violation of Article 5 RTA is a misdemeanour, carrying also the same maximum penalty: violation of Article 5 RTA can give rise to a maximum punishment of two months' imprisonment (or a fine). From this – relatively – low maximum sentence, it appears that Article 5 RTA does not aim to cover criminal behaviour of an (entirely) different order – in the sense of being (far) more dangerous – than acts covered by the specific rules.

Although both the specific traffic offences and the general traffic offence of Article 5 RTA are misdemeanours, requiring neither intent nor negligence, the defendant may always invoke a ground excluding liability, like the defence of absence of all culpability. If it is held that the defendant could not have acted in any other way, for example because he is suddenly struck by a heart attack, the defendant will not be convicted.

Driving Under Influence

An important specific provision which does not regulate traffic behaviour as such, but the state of the driver is Article 8.1 RTA. This provision contains the general rule forbidding a person "to drive a motor vehicle, when he is under the influence of a substance to such an extent that he must be deemed to be unfit to operate a motor vehicle, while he knows or should reasonably be expected to know that the use of the substance – whether alone or in combination with another substance – may compromise his driving ability." There is a specific rule with regard to alcohol, using (formal) limit values: driving is forbidden when upon analysis

9 On this discussion, *see* Simmelink 1995, pp. 257-299; Krabbe 1999, pp. 115-118; Harteveld & Robroek 2012, pp. 41-44.

the alcohol level appears to be greater than 220 micrograms per litre of exhaled breath and/or the blood alcohol level is greater than 0.05% (Article 8.2 RTA). A person who has been ordered to submit to a blood test is required to cooperate (Article 163.6 RTA). Violation of these rules, including the obligation to cooperate, constitutes a felony (Article 178 RTA), carrying the same maximum prison term of three months (Article 176.3 RTA).

Currently, a specific provision using limit values with regard to other substances than alcohol is lacking, so only the general rule of Article 8.1 RTA is applicable. This rule is quite complicated, in particular where it says that the driver is under the influence of a substance to such an extent "that he must be deemed to be unfit to operate a motor vehicle". According to case law, this requires neither actually dangerous or maladjusted traffic behaviour, nor deviant traffic behaviour or other external characteristics from which the inability to drive may be concluded, nor a significant increase of the risk of creating an accident. Decisive is, according to case law, whether "the average driver in the specific circumstances of the case is supposed to be unfit to drive, and the serious suspicion, based upon this presupposition, that the defendant is also supposed to be unfit to drive".[10] This means that a forensic test concluding that "the driving ability is probably influenced negatively" will not always be sufficient to prove that the defendant was supposed to be unfit to drive, and that additional details on the defendant's driving behaviour will be important. Difficulties in applying this rule is one of the reasons the government has proposed legislation that provides for a specific provision with regard to narcotics, operating formal limit values, in line with the provision for alcohol.[11]

2.3.2 Intentional Offences

The Concept of Intent

The most serious offences that can be committed in traffic (or in any other context) are intentional offences. Dutch law does not include specific intentional *traffic* offences. In case of intentionally causing injury or death, the traditional intentional offences come into play. Article 287 CC criminalizes intentional homicide, intentionally taking the life of another person, carrying a maximum prison sentence of fifteen years. Article 302.1 CC criminalizes intentionally causing serious bodily injury to another person; the perpetrator is liable to a maximum term of imprisonment of eight years. Article 302.2 CC provides for an aggravating factor: where death ensues as a result of the act, the offender is liable to a term of imprisonment of not more than ten years. Article 302.1 CC in conjunction with Article 302.2 CC constitutes a so-called result-qualified offence, in which death is an objectified consequence of the conduct. This means that neither intent nor negligence is required with respect to the death; a causal connection between the conduct, i.e. intentionally inflicting serious bodily injury and death suffices. The existence of this result-qualified offence particularly shows that Dutch criminal

10 Supreme Court 27 March 2012, ECLI:NL:HR:2012:BT2669.

11 Kamerstuk 32859.

law draws a sharp distinction between offences based on whether or not an intent to kill can be established. Specifically, unlike under English law, the perpetrator cannot be guilty of intentional homicide if, although he caused another person's death, he 'merely' intended to cause serious bodily injury.

Dutch criminal law recognizes several gradations of intent, comprising not only 'wilful intent' (*dolus directus*) and 'awareness of a high degree of probability' (*dolus indirectus*), but also 'conditional intent' (*dolus eventualis, bedingter Vorsatz*), which is considered the lower limit of intent.[12] The Dutch Supreme Court defines conditional intent as "consciously accepting a substantial chance of causing the consequence".[13] Conditional intent means that the perpetrator is aware of the substantial chance that a certain result will occur, yet nevertheless accepts that chance. The received opinion is that conditional intent under this definition includes not only a cognitive component (awareness of the substantial chance), but also, albeit slight, a volitional component (accepting the chance). As regards the latter point, according to the prevailing opinion, it is the volitional component that distinguishes (conditional) intent from negligence in the form of 'conscious negligence'.[14] With conscious negligence, the perpetrator is likewise aware of the substantial chance that the result will take place, but instead of accepting this possibility, wrongfully trusts that the result will not occur. If the perpetrator even lacks this awareness, he enters the realm of negligence in the form of 'unconscious negligence'.

If dangerous behaviour did not result in death or serious bodily injury, the defendant may be prosecuted for *attempted* intentional homicide or *attempting* to cause serious bodily injury. In case of attempt, the maximum prison term is reduced by one-third (Article 45 CC). The intent requirement for attempts in Dutch criminal law is the same as for complete crimes, meaning that conditional intent suffices.

Intentional Offences and Dangerous Driving

What is the practical relevance of intentional offences in the context of dangerous traffic behaviour? Answering this question must start with the Porsche ruling of 1996, a notorious case in Dutch criminal law.[15] A young man and his friend had quite a few drinks at several bars. After that, they embarked on a dangerous journey with a Porsche. The Porsche was speeding, running through red lights and overtaking other drivers in a dangerous way. The driver of a Seat later testified that the Porsche attempted to overtake the Seat three times. Each time, the Porsche moved swiftly to the other lane and returned ever so quickly. After that, the Porsche did go to the other lane all the way. At that time, a Volvo coming from the opposite direction was close by. The Porsche collided with the Volvo. All

12 *See* De Hullu 2012, pp. 225-232.

13 *See, e.g.*, Supreme Court 25 March 2003, ECLI:NL:HR:2003:AE9049.

14 *See, e.g.*, Supreme Court 25 March 2003, ECLI:NL:HR:2003:AE9049. The theory of intent is discussed extensively by Van Dijk, this book, Chapter 9.

15 Supreme Court 15 October 1996, ECLI:NL:HR:1996:ZD0139. The Porsche ruling is also discussed (in much more detail) by Van Dijk, this book, Chapter 9.

four occupants of the Volvo and the Porsche driver's passenger were killed by the collision. The driver of the Porsche was charged with five separate counts of intentional homicide. The Court of Appeal convicted the defendant of intentional homicide; according to the court, the defendant acted with conditional intent. But the Supreme Court quashed this verdict because it was insufficiently substantiated:

> 5.4 In cases such as the present one, where the evidence leads one to infer that the defendant by his conduct caused substantial danger for his own life as well, the court must, however, take into account that it is – absent indications to the contrary – not likely according to rules of general experience that the defendant will also accept the substantial chance that a head-on collision with an oncoming car will occur, as a result of which he will die himself.
> 5.5 In light of the aforementioned and taking into account that the evidence indicates that the defendant – apparently to avoid a collision – aborted several overtaking manoeuvres before [...] completing the fatal overtaking manoeuvre, which indicates that the aforementioned manoeuvre, at least in the defendant's imagination and expectation would not result in a collision, [...] the finding that the defendant's intent was directed at the death of the victims stands in need of further motivation.

The Supreme Court referred the case to another Court of Appeal, which acquitted the defendant on the charge of intentional homicide and convicted him of multiple counts of negligent homicide in traffic.

The prevailing view in literature is that the Supreme Court in the Porsche ruling emphasized the volitional element of conditional intent: conditional intent requires not only awareness of the chance but also accepting it. This volitional element needed further substantiation, in light of the defendant's behaviour and the notion that people are not inclined to put their own life in danger.[16]

At the time, it was thought that the Porsche ruling – in particular because of the reference to the notion that people are not inclined to put their own life in danger – would make a conviction for intentional homicide in traffic cases almost impossible,[17] but this prediction has not turned out to be true.[18] Although the Porsche ruling is still standing case law, quite a few people have been held liable for intentional homicide, in most cases because the perpetrator had conditional intent with regard to the victim's death, i.e. it was established that the defendant consciously accepted the substantial chance that he would cause another road user's death. The fact that the Porsche ruling has not stood in the way of convictions for (attempted) intentional homicide in many cases has several reasons.[19]

16 De Jong 1999a, p. 4; Wolswijk 2000, p. 800; De Hullu 2012, p. 240.

17 This was also considered problematic in light of the maximum prison terms for negligent homicide in traffic at the time: one year's imprisonment and three years in case of intoxication (in case of multiple deaths, the maximum prison terms according to the rules on concurrent sentences were one year and four months respectively four years). In 1998, these terms were increased substantially (*see* Sections 2.3.3 and 2.5.1).

18 Vellinga 2012, p. 171.

19 The descriptions of the cases discussed in the next paragraphs are adopted from Van Dijk forthcoming.

First, the notion that people are not inclined to risk their own life is an assumption; as the Supreme Court itself stated, there may be "indications to the contrary". In some cases of very dangerous driving, where the defendant does not only risk the life of other road users but also his own, it is established that the defendant *did* intend to kill himself. In one case, the defendant drove his delivery van into another vehicle's rear without braking. The defendant's car travelled at between 107 and 129 km/h on a 100 km/h road. The vehicles interlocked, went over a guardrail, collided with a traffic light and went down a slope. The defendant and the couple in the other car sustained injuries. The defendant had had an argument with his girlfriend and had consumed about fifteen beers in a bar (a BAC of 0.113%; the legal limit being 0.05%; *see* Section 2.3.1). He later testified that he had wanted to commit suicide by driving into something at high speed. While driving, he told his girlfriend on the phone: "I'm driving 160 now and you're going to hear how I demolish myself."[20] The defendant was convicted of two counts of attempted intentional homicide. In such a case of suicidal intent, the court is, of course, not relieved of establishing that the defendant's intent was directed at the death of the victim, but it does make a conviction easier in light of the Porsche ruling.

Following on from this, there are cases where the defendant makes a self-incriminating statement directly regarding his position towards the victim's death. In one case, the defendant drove his car after having consumed substantial amounts of alcohol. The police tried to stop his vehicle, but the defendant drove away for fear of having to spend the night in custody. He drove substantially faster than the 50 km/h speed limit, although he knew that it was usually busy at that time because the bars had just closed down. He turned off his lights on a dimly illuminated road and bumped successively into three bicyclists with illuminated rear lights. After each collision, he continued his journey, even pushing down on the accelerator in between. The defendant was convicted of two counts of intentional homicide and one count of attempted intentional homicide. The Supreme Court briefly held that the Court of Appeal's inference of intent was sufficiently substantiated. In its ruling, the Court of Appeal had referred to the defendant's statement to the police: "I wanted to escape from the police at all costs."[21] If the court gives credence to the literal meaning of such a statement – the defendant wants to escape from the police "at all costs", thus even at the cost of the lives of others – homicidal intent can indeed easily be proved. The question whether the defendant was also inclined to put his own life in danger or whether he did not think about this danger at all may be left unanswered.

The previous case is also illustrative for a different reason. In his advisory opinion, the advocate general provided another argument for holding that the inference of intent was sufficiently substantiated.[22] He pointed out that, while the Porsche case concerned a deadly collision of several 'strong' road users (motor vehicles), this case concerned a violent confrontation between a 'strong' road user (the defendant in his car) and multiple 'weak' road users (bicyclists). Due to the

20 's-Gravenhage Court of Appeal 11 November 2010, ECLI:NL:GHSRG:2010:BQ1112.
21 Supreme Court 23 January 2001, ECLI:NL:HR:2001:AA9594.
22 The advocate general is an independent legal advisor to the Supreme Court.

relative invulnerability of the defendant, conscious acceptance of the deaths of the victims is perfectly compatible with not consciously accepting one's own death. In a later case involving a collision between the defendant's motor vehicle and a bicyclist, the Supreme Court upheld the Court of Appeal's following line of thought, which may be interpreted as a seal of approval for this argument: "From the defendant's way of driving in his off-road vehicle one cannot but conclude that he was not concerned with its possible consequences for other road users, in particular vulnerable road users such as bicyclists."[23]

The final case to be discussed concerned the following facts. The defendant was driving with his family. His wife was in the passenger seat and their eleven-month-old daughter was in the rear in a child safety seat. The car ended up in a canal, leaving a thirty-five-metre tyre mark on the road and verge. There was no indication of braking. The defendant saved his daughter and helped his wife getting out of the water. The Court of Appeal ascertained that the defendant had deliberately steered the car into the canal. The court established conditional intent with regard to killing his wife. The defendant was acquitted, however, of attempted intentional homicide of his daughter. The Court of Appeal did not address the fact that the defendant also had risked his own life. Interestingly, according to the Supreme Court, the defendant's claim that he had not intended to kill his wife because he had not accepted the chance of dying himself did not compel the court to further reasoning, because the Porsche case concerned "a dangerous traffic manoeuvre", whereas this case concerned "a deliberate act of violence against the victim."[24] Apparently, the fact that the defendant committed a deliberate violent act against the victim may relieve the lower court from the difficult task of explaining why the defendant risked his own life.

To conclude, it appears that the Porsche ruling need not stand in the way of convictions for intentional homicide. The applicability of intentional offences with regard to dangerous driving is not merely theoretical.

2.3.3 Negligent Homicide and Negligently Causing Serious Injury in Traffic

Legal Framework; Core Provisions

The Criminal Code includes several *general* negligent offences, like negligent homicide and negligently causing serious bodily injury. Negligent homicide (Article 307 CC) carries a maximum prison term of two years in case of 'plain' negligence and four years in case negligence takes the form of 'recklessness'.[25] Negligently causing serious bodily injury (Article 308 CC) can give rise to a

23 Supreme Court 27 February 2004, ECLI:NL:HR:2004:AN9360.

24 Supreme Court 29 September 2009, ECLI:NL:HR:2009:BI4736. Furthermore, the Supreme Court refused to take the acquittal regarding the defendant's daughter into account, because the appeal in cassation did not pertain to the acquittal.

25 The Dutch concept of recklessness (roekeloosheid) differs from the Anglo-Saxon concept of recklessness. Dutch criminal law only distinguishes between intent and negligence, with recklessness being the most severe form of negligence, while in many other systems recklessness is a category of its own, next to intent and negligence. The meaning of recklessness is discussed in more detail in Section 2.5.

maximum prison term of one year (negligence) or two years (recklessness). Next to these general offences, Dutch law since long contains a specific *traffic* offence of negligently causing death or serious injury, carrying a much higher maximum sentence. The law on this negligent traffic offence has been changed a couple of times and we will return to these changes later on in Section 2.5. The relevant provisions now read:

> *Article 6 RTA*
> Anyone who participates in traffic is forbidden to behave in such a way that a traffic accident which is due to his negligence takes place which causes another person to be killed or which causes serious bodily injury to another person or such physical injury that it results in temporary illness or impediment of the performance of daily routines.
>
> *Article 175 RTA*
> 1. Violation of Article 6 will be punished with:
>   a. a term of imprisonment of not more than three years or a fine of the fourth category, if it is an accident that causes the death of another;
>   b. a term of imprisonment of not more than one year and six months or a fine of the fourth category, if it is an accident that causes bodily injury to another.
> 2. If it is a case of recklessness, violation of Article 6 will be punished with:
>   a. a term of imprisonment of not more than six years or a fine of the fifth category, if it is an accident that causes the death of another;
>   b. a term of imprisonment of not more than three years or a fine of the fourth category, if it is an accident that causes bodily injury to another.
> 3. If the guilty person [was under the influence of alcohol or drugs or refused to cooperate with an order to test for these substances], or if the accident was caused or was partially caused by the fact that he violated the speed limit as specified by this law to a serious extent, or he was very closely tailing another vehicle, or he did not yield right of way, or he was overtaking in a dangerous way, the terms of imprisonment as mentioned in the first and second section may be increased by one-half.

As is apparent from these provisions, the maximum punishment is determined by three factors. The first one is the result of the accident, caused by negligent traffic behaviour (Article 175.1 RTA): in case of death of another person, the maximum prison term is three years; in case of serious injury[26] one year and six months. The second factor is the degree of negligence (Article 175.2 RTA): recklessness functions as an aggravating factor, doubling the maximum sentence. So in case of death, the offender is liable to a maximum prison term of six years; with serious bodily injury three years. Thirdly, and irrespective of the presence of the aggravating factor of recklessness, the maximum prison term is determined by

26 For the sake of brevity, I will only refer to 'serious injury', although Article 6 RTA also mentions "such physical injury that it results in temporary illness or impediment of the performance of daily routines".

other, more specific aggravating factors (Article 175.3 RTA). These circumstances – like speeding and driving under influence – increase the maximum sentence by one-half, both with respect to negligence and recklessness. Noteworthy is that driving under influence, unlike the other factors, is an aggravating factor regardless of whether the intoxication has contributed to the accident in any way. All in all, the different factors have the effect that in case of negligently causing death (Article 175.1 RTA: three years), when negligence takes the form of recklessness (Article 175.2 RTA: multiplied by 2), and a specific aggravating factor applies (Article 175.3 RTA: multiplied by 1.5), the maximum sentence is nine years of imprisonment. If the defendant has caused multiple deaths, he is, according to the rules on concurrent sentences, liable to a prison term of twelve years.[27]

The key element of the offence of Article 6 RTA is negligence. I will turn to the general concept of negligence under Dutch law shortly, but first two remarks must be made. In the following, when referring to the offence of Article 6 RTA, I will use – for brevity's sake – expressions like negligently causing a serious traffic accident or causing a serious accident by negligence; it is implied that the accident resulted in either death or serious injury, as required by Article 6 RTA. The second remark concerns the object of negligence in Article 6 RTA. The text of this provision clearly indicates that negligence in Article 6 RTA refers to the accident, i.e. the accident must have been caused by negligence. However, it is less clear – and case law still has not clarified this issue – whether negligence also refers to death or injury. According to some authors, these results of the accident are objectified consequences, meaning that neither intent nor negligence is required with respect to death or injury.[28] Negligence is thus related to the accident only, while a causal connection between negligently causing the accident and death or injury suffices. Others take the view that negligence refers to both the accident and the ensuing result; thus, negligence must have caused death or injury (*via* negligently causing the accident).[29] I will not go into this discussion. In practice, the difference between these views is not of great relevance. In almost all cases, when the accident was caused by negligence, death or injury flowing from the accident can be considered as caused by negligence as well.

The Concept of Negligence[30]

Under Dutch law, negligence – both plain negligence and recklessness – can be defined as a blameworthy, gross (or substantial) deviation from the required standard of care that has caused a certain unwanted result.[31] The deviation from the standard of care may occur either while the defendant did not even consider the unwanted consequence of his conduct (unconscious negligence) or while he

27 In case of conviction for more than one offence, only one prison term is imposed. The maximum prison terms are accumulated, but the total result will not be more than one-third above the maximum prison term for the most serious felony (Article 57 CC).

28 *See*, *e.g.*, Krabbe 1999, pp. 121-123.

29 Van Dijk 2008, p. 37; Harteveld & Robroek 2012, p. 64.

30 *See*, *e.g.*, De Hullu 2012, pp. 253-256.

31 Conceptually, causation (causing an unwanted result) is only an element of negligence when it concerns result offences (which most negligent offences are, like violation of Article 6 RTA).

did consider the consequence but (wrongfully) trusted that it would not occur (conscious negligence).

Under this definition, the concept of negligence has a two-stage structure. Negligence consists of an objective part, a gross deviation of a duty of care, hereafter termed gross negligence, and a subjective part, i.e. the deviation must be blameworthy. The objective component can be analysed into different aspects. In general, a defendant's act constitutes a deviation from the standard of care with regard to a certain unwanted result if the defendant could have foreseen that his behaviour would cause this result. In the context of Article 6 RTA, the foreseeability of a serious traffic accident often follows from the violation of a concrete traffic rule that is supposed to prevent traffic accidents from happening. The reasoning is that the defendant could have foreseen that violating the concrete rule – not yielding right of way, speeding – would bring about an accident.[32] Of course, this reasoning does not always hold. It may be, for example, that the violation of the concrete norm itself was not foreseeable (the traffic sign was invisible for road users), as a result of which the accident was neither foreseeable. On the other hand, the unwanted result may also be foreseeable if no concrete norm is violated, for example in case of driving with an inappropriate speed given the circumstances. Furthermore, foreseeability of the unwanted result only constitutes a deviation from the standard of care if the defendant took an *unacceptable* risk. This is particularly relevant in the field of traffic, since participating in traffic involves inherent risks; road users are not required to avoid any foreseeable risk, no matter how low. Another important objective aspect under Dutch law is that criminal negligence requires 'more culpability' than civil negligence. Criminal negligence always means *gross* negligence (*culpa lata*), i.e. a gross deviation from the standard of care. Whether this is the case may depend on – amongst other aspects – the defendant's professional position. If the defendant is a professional bus driver, he bears a heavier responsibility, what German doctrine calls a *Garantenstellung*.[33] His responsibility is extended in the sense that his behaviour is not compared to what is to be expected from a (reasonable) normal road user, but to what is expected from a professional bus driver.

Negligence also has a subjective component: the deviation from the standard of care must be blameworthy. Blameworthiness requires that the deviation was avoidable. The defendant must have been able to comply with the required standard of care. In assessing the avoidability, the defendant's mental and physical capabilities are taken into account. Acute physical disabilities (e.g. a heart attack), chronic physical disabilities, mental disabilities, lack of experience or lack of education could be relevant for the assessment of the subjective component. Of course, the doctrine of prior fault (*culpa in causa*) is taken into account in this assessment. A person who knows or should know that he is unfit to drive cannot later claim that he could not have avoided the collision due to his condition.

From the definition of negligence as a blameworthy, gross deviation from the required standard of care follows that negligent offences have a different structure

32 Vellinga 2012, p. 150.
33 De Hullu 2012, p. 255.

than intentional offences. In case of intentional offences, proof of the definitional elements of the offence presumes but does not imply the presence of the general requirements for liability – unlawfulness and blameworthiness.[34] A ground for justification or excuse does not negate intent. Furthermore, since the charge only includes the definitional elements of the offence, this also has the procedural consequence that the absence of the grounds excluding liability is subjected to a lower standard of proof.[35] With negligent offences, this is different. Unlawfulness and blameworthiness are definitional elements of a negligent offence. Consequently, negligence subsumes all grounds excluding liability. For example, speeding in order to rush a dying person to the hospital may be justifiable (necessity), in which case the defendant did not take an unacceptable risk and thus did not act negligently. Negligence also subsumes excusatory grounds. Such a ground, like an excusable physical or mental defect (e.g. unconsciousness as a consequence of a diabetic attack), negates negligence. Since unlawfulness and blameworthiness are definitional elements of a negligent offence and therefore included in the charge of negligence, this would also seem to imply that, unlike a charge of an intentional offence, the standard of proof applicable to these grounds is the same as the standard that applies to normal definitional elements. For a conviction, the court then would have to be *convinced*, based on evidence, of their presence. In practice, however, the position of unlawfulness and blameworthiness does not differ that much from their position with respect to intentional offences. In cases of negligence in traffic, courts go rarely into the blameworthiness of the defendant, i.e. the subjective component of negligence (and the same goes for unlawfulness). If the defendant grossly deviated from what a careful road user would have done, it is usually inferred that he could have acted differently. The court will only deal with the subjective component of negligence if there is an indication that the defendant cannot be held to the standard of the careful road user (which is seldom the case).

2.4 The Lower Limit of Negligence

Article 6 in conjunction with Article 175 RTA is the most important provision with regard to serious traffic offences. In practice, the negligence element causes difficult problems. Two of these problems will be discussed, both concerning demarcation issues: the lower limit of plain negligence and the lower limit of recklessness. The second issue will be discussed in Section 2.5.

2.4.1 General Approach to Establish Negligence

One of the most difficult problems with regard to Article 6 RTA is the question of the lower limit of negligence. For many years, this issue played no significant role. In practice, it remained in the background and the Supreme Court did not give any guidelines as to what constituted negligence. Around the year 2000, there was

34 *See* Section 2.2.
35 *See* Section 2.2.

a turning point. In literature, the question arose whether negligence had become 'eroded' in practice. Some authors stated that in case law the requirement of *culpa lata* – criminal negligence is *gross* negligence – had become without substance. More specifically, they stated that a single violation of a concrete traffic provision – like speeding or not yielding right of way – was sufficient to establish negligence.[36] Probably due to this discussion, and to promote more legal certainty, the Supreme Court in its ruling of 1 June 2004 for the first time commented on the concept of negligence in more general terms. In this Winssen case, the Court stated:

> [The Supreme Court is only allowed to determine whether negligence, as proved, could be inferred from the evidence that is ascertained by the lower court.] It comes down to the defendant's conduct considered in its entirety, its nature and severity and the other circumstances of the case.
> This implies that it is not possible to state in general whether one single traffic violation may be sufficient to find negligence proved. After all, various factors need to be taken into account in that respect, like the nature of the traffic violation and the seriousness thereof, and the circumstances under which it occurred. Furthermore, it should be noted that proof of negligence [...] cannot already be derived from the seriousness of the consequences of traffic behaviour which violates one or more traffic rules.[37]

It has been said that this judgment does not really give any guidelines as to what constitutes negligence.[38] This is partly true. The last remark of the quoted paragraph seems even rather self-evident. If proof of negligence could be derived from the seriousness of the consequences of the traffic violation, negligence in the sense of Article 6 RTA could always easily be proved, since the applicability of Article 6 RTA presupposes the presence of serious consequences, namely death or serious injury. Furthermore, the ruling does not give specific guidelines for the lower courts indeed. But this is hardly surprising once the starting point is that the establishment of negligence is determined to a great extent by the particular circumstances of the case. At the same time, the finding that this *is* the starting point and that, therefore, it is not possible to state in general whether one single traffic violation may be sufficient to find negligence proved is in itself not without meaning.

This starting point is also important in relation to the aforementioned issue of the *Garantenstellung*, i.e. the phenomenon that a person who engages in a certain activity should be competent to carry out this activity. A possible reasoning in this context would be that taking part in traffic as a road driver and violating a traffic regulation constitutes negligence *because* of this *Garantenstellung*.[39] In this view, negligence is not gross just because a traffic rule has been violated, but because

36 *See, e.g.*, De Jong 1999b, pp. 833, 836.
37 Supreme Court 1 June 2004, ECLI:NL:HR:2004:AO5822.
38 Van Dijk 2008, p. 35.
39 Robroek 2010, p. 123.

it has been violated by someone who, being a road user (and in the possession of a driver's licence), did not act as he was expected to, namely as a competent road driver. Thus, the *Garantenstellung* would lift the traffic violation to the level of *gross* negligence. In this reasoning, violating a traffic rule would, in principle, constitute negligence. However, from the Winssen ruling it appears that this is not a valid reasoning in general. Although the Supreme Court does not rule out the possibility that one traffic violation constitutes negligence, it depends on the circumstances under which the violation occurred whether this is the case.[40]

Finally, the significance of the judgment lies in the facts of the case at hand.[41] The Court of Appeal had established that the defendant, driving a car at a speed of about 80 km/h on a two-lane road, after a slight left turn, did not keep to the right as much as possible, but suddenly, for no reason, had come so far to the left that she thereby ended up at the wrong side of the road and collided head-on with an oncoming vehicle driving on that side of the road. According to the Supreme Court, "*such* traffic behaviour can in principle bear the inference that the defendant acted substantially inattentive and/or careless and that the traffic accident was due to the defendant's negligence referred to in Article 6 of the Road Traffic Act 1994."[42] This judgment illustrates the meaning of the general comments on negligence in the above-quoted paragraph when applied to this specific case. At first, it may seem that the defendant can only be blamed for a single violation of a specific traffic rule, namely a breach of the requirement to keep as far to the right as possible (Article 3.1 RTTSR). But then specific circumstances are left out, to which the Supreme Court explicitly refers, the most important one being – probably – that the defendant, for no reason, came *so far* to the left that she ended up on the wrong side of the road. Her traffic behaviour was therefore a *serious* breach of the specific traffic rule.

2.4.2 Categories of Punishable Negligence

The Winssen 'rule' obviously needs to be specified. And although case law does not provide for explicit sub-rules – except for one, which will be discussed further on – research by advocate general Vellinga, an influential expert in this field of law, indicates certain types of cases in which in general negligence (in the sense of Article 6 RTA) can be proved.[43]

The first category relates to *consciously* taking an unacceptable risk. An example would be the driver who, nearing a junction, sees another road user to whom he should give right of way, but (wrongly) thinks that he can cross the road in time before the other road user crosses the junction.[44] The second category concerns cases in which *lack of precaution* leads to a violation of the duty of care, like driving with fogged windows, driving too fast to be able to react adequately to possible

40 Vellinga 2012, p. 160.
41 Vellinga 2012, p. 160.
42 Italics added.
43 Vellinga 2012, pp. 168-169; *see also* Vellinga 1979, pp. 122-123.
44 *See*, *e.g.*, Supreme Court 13 April 2009, ECLI:NL:HR:2009:BH3921.

traffic situations or not reducing speed when crossing a priority junction.[45] The third category concerns drivers with diminished driving capacity. Negligence is generally proved when the driver makes a mistake which is caused by being under the influence of alcohol or overtiredness. Case law is not entirely clear, however, in particular with regard to driving under influence. From some rulings, it clearly appears that the use of alcohol was relevant for the court in establishing negligence, but without explicitly requiring that the use of alcohol actually played a role in causing the accident.[46] Probably, the case law must be understood to mean that this contributing role is – dependent on the alcohol level – fairly easily assumed.

The second and third category have a common characteristic, which probably explains why the threshold of gross negligence is met: the defendant has increased the risk of causing an accident by a prior fault.[47] He has increased this risk by showing a lack of precaution, in the form of a lack of thoughtfulness, of knowledge or of prudence that is needed.

Although this classification is certainly helpful, practice still leaves us with difficult cases, as it may be hard to determine whether the defendant was precautious *enough*. The following judgment of the Supreme Court provides a dramatic illustration. In this case, the defendant, a van driver, caused the death of a young boy. He had stopped his van to give right of way to the boy and his mother who were both riding a bicycle. While both cyclists were crossing over, the boy fell. Due to the height of the van and his own small stature, the defendant did not see this. The mother made a gesture with her hand. While she meant to indicate that the defendant should stop, the defendant wrongly concluded from this gesture that the boy was not in the danger zone. Thereupon the defendant went on his way and ran the boy over. The Supreme Court accepted the conviction. In light of the limited view of the defendant and the care that the driver of a motor vehicle is required to take vis-à-vis very vulnerable road users, the defendant should have verified *himself* that the boy was not in any danger instead of relying on the gesture of someone else.[48]

Next to these three categories, Vellinga distinguishes a fourth category in which in general negligence can be proved: committing a traffic fault under conditions that are favourable to avoid this fault, like having good view or having knowledge of the local circumstances. With this category, it seems that the grossness of negligence can be inferred from the fact that avoiding the accident was relatively easy.[49] However, development in case law has complicated the assessment of this category. This development concerns cases of so-called 'momentary inattention'.

An important case in point is the Geervliet ruling from 2008. The defendant came from a gas station and wanted to drive on to the adjoining road which had an

45 *See*, *e.g.*, Supreme Court 21 April 2009, ECLI:NL:HR:2009:BG9142; Supreme Court 25 January 2011, ECLI:NL:HR:2011:BO2595.

46 Supreme Court 29 April 2008, ECLI:NL:HR:2008:BD0709; Supreme Court 22 November 2011, ECLI:NL:HR:2011:BR3005.

47 Vellinga 1979, p. 123.

48 Supreme Court 17 January 2006, ECLI:NL:HR:2006:AU3447.

49 Vellinga 1979, p. 124.

80 km/h speed limit. The road was clearly marked with give-way road markings (but without a stopping sign). The Court of Appeal determined that the defendant had been aware of the fact that he had to yield right of way. The defendant brought his car to a near-stop and looked over his left shoulder to check for oncoming traffic. He did not see any and went on his way. After about 20 metres, he became aware of 'something' braking. It appeared that a motorcycle had bumped into his left rear side. The motorcyclist sustained serious bodily injury because of this. The Court of Appeal convicted the defendant of Article 6 RTA, but the Supreme Court quashed the verdict. According to the Supreme Court:

> the mere fact that the defendant, when he was checking for oncoming traffic, did not see the motorcyclist, to whom he had to yield right of way, although the motorcyclist must have been visible to him, [is not sufficient to establish negligence].[50]

Since the Court of Appeal based its verdict of negligence on the sole assumption of the visibility of the victim, the verdict was not properly substantiated. According to this ruling, which was confirmed by subsequent judgments,[51] it seems that violating a traffic rule resulting from merely 'momentary inattention' in the form of not seeing the victim although he was visible – 'failing perception', 'looking but not seeing' – on itself is not enough to establish negligence.[52] However, the Geervliet ruling gives rise to several comments and questions.

First, a disadvantage of this approach is that in some cases the defendant may prevent negligence from being proved by making a false statement. The defendant may state that he did look for oncoming traffic (and did not notice any traffic), while in reality he did not look at all. Or he may state that he did look but did not see oncoming traffic, while in reality he did see oncoming traffic.[53]

The second issue concerns the question when it is really a case of *mere* (momentary) inattention. It has been said that the Geervliet ruling implies that a failing perception will only constitute negligence when it is the result of other culpable behaviour, of a lack of precaution.[54] A clear case would be when overtiredness caused the failing perception[55] or when the defendant failed to see the other road user (although he had looked) because he did not adapt his speed and thus made it more difficult to see oncoming traffic. According to Vellinga, the Geervliet ruling would thus mean that a proviso should be made with regard to the aforementioned fourth category, i.e. committing a traffic fault under conditions that are favourable

50 Supreme Court 29 April 2008, ECLI:NL:HR:2008:BD0544.

51 *See*, *e.g.*, Supreme Court 27 May 2008, ECLI:NL:HR:2008:BC7860.

52 Vellinga 2012, p. 169.

53 Vellinga 1979, p. 198, note 402. This is not to suggest, of course, that such a statement always stands in the way of establishing negligence. The court may find such a statement implausible given the objective facts of the case.

54 *See*, *e.g.*, the advisory opinion to the Supreme Court of advocate general Knigge, ECLI:NL:PHR:2008:BE9800.

55 The aforementioned (practical) disadvantage may also come up with overtiredness: the defendant may state that he was not tired at all, while furnishing proof of the opposite can be difficult. *See also* Brookhuis, this book, Chapter 8.

to avoid this fault. In his view, the Geervliet ruling implies that committing a traffic fault under conditions that are favourable to avoid this fault does not suffice for negligence when the fault resulted from mere momentary attention.[56] But another view is also possible, in which this fourth category still stands. In this view, likewise (and in line with the Geervliet ruling), there must be something more than a failing perception to establish negligence. But this can also concern the fact that the failing perception may easily have been avoided because of favourable conditions, for example because the weather was very clear.[57]

Which view represents the current law is not yet clear. The issue is further complicated by the fact that it will not always be clear whether a failing perception can actually be attributed to culpable behaviour of the defendant, to a lack of precaution. This can be illustrated by the following case.[58] The defendant had caused a deadly accident when leaving a roundabout by colliding with a bicyclist. The defendant claimed not to have seen the cyclist when leaving the roundabout. The Court of Appeal considered that the defendant had not noticed the cyclist, although, from the moment he entered the roundabout, he could have easily seen the cyclist. How is this case to be assessed in terms of the two views? One could say that this is a case of committing a traffic fault (not yielding right of way) resulting from mere momentary attention (the defendant, when exiting the roundabout, looked but did not see the cyclist), under conditions that are favourable to avoid this fault: the conditions were favourable because the defendant could already have seen the cyclist from the moment he entered the roundabout. Put this way, Vellinga might argue that the defendant's behaviour did not constitute negligence. However, the court in this case argued differently: "A driver has a special duty of care to anticipate traffic conflicts, and to ascertain the presence of other traffic users he may encounter and must yield right of way to". The court finds that the defendant violated this duty of care, because at no time he noticed the cyclist, and finds negligence proved. In other words, the court turns these favourable conditions into a *normative* proposition: the defendant did not exercise the required precaution, so not seeing the victim is the result of culpable behaviour (and thus he acted negligently). The ultimate question, therefore, remains what is required from a road user in such a case.

2.5 The Boundary Between Plain Negligence and Recklessness

2.5.1 Introduction of Recklessness as a Form of Negligence

The law on the negligent traffic offence has changed several times. Before 1998, the RTA provided for a maximum prison term of one year for negligent homicide in traffic (in case of negligently causing bodily injury: nine months). If the per-

56 Vellinga 2012, p. 169.

57 The court must, of course, refer to such conditions in its justification of finding negligence proved.

58 Arnhem Court of Appeal 4 May 2012, ECLI:NL:GHARN:2011:BQ4034.

petrator was under the influence of a substance that may impair driving ability, like alcohol, a punishment of three years' imprisonment could be imposed (bodily injury: two years).[59] In case of multiple deaths (or injuries), a third could be added to the prison term according to the rules on concurrent sentences (Article 57 CC), resulting in a maximum prison term of four years.

The law was changed in 1998.[60] This amendment involved, firstly, an increase of the maximum prison term up to three years for negligent homicide in traffic (in case of bodily injury: one year). Secondly, speeding was added as an aggravating factor, next to driving under influence. The third and most striking element of the amendment was that the presence of one of these aggravating factors tripled the maximum prison term, increasing it up to nine years (three years in case of bodily injury). The amendment was criticized by scholars on several grounds.[61] The maximum penalty of nine years in itself was considered almost draconian. Furthermore, the increase from three years to nine years in case of an aggravating factor seemed unbalanced, both within the context of the traffic offence (a leap from three to nine years) and in relation to the maximum penalties for the *general* offences of negligently causing death (Article 307 CC) or serious bodily injury (Article 308 CC), which were, at the time, nine respectively six months' imprisonment. And finally, picking out driving under influence and speeding as aggravating factors seemed rather arbitrary. Were there not other circumstances – for example running a red light or tailgating – which might also legitimize an increased maximum? The criticism thus entailed a two-folded message: expand the list of aggravating factors, but lower the accompanying maximum prison term of nine years.

With the amendment of the RTA in 2006,[62] resulting in the law as it now stands (*see also* above), the legislator took partly notice of this message. The amendment involved an increase of the maximum prison term up to one and a half year for the traffic offence of negligently causing injury (Article 175.1 RTA) and, much more important, the introduction of extra aggravating factors: negligence in the form of recklessness – as opposed to plain negligence – leads to doubling the maximum sentence (Article 175.2 RTA), while on top of that other explicitly mentioned forms of hazardous driving – amongst others driving under influence, speeding and tailgating – multiply the maximum sentence with a factor of one and a half (Article 175.3 RTA). At the same time – these alterations being part of a larger project involving a general reassessment of the maximum sentences – the sentences for the *general* negligent offences were modified. With respect to negligent homicide, the maximum prison term was increased from nine months to two years (Article 307.1 CC) and with respect to negligently causing serious injury from six months to one year (Article 308.1 CC). Furthermore, like with the negligent traffic offences, recklessness has been introduced as an aggravating factor, doubling the maximum sentence. Thus, the general offence of negligent homicide

59 This includes the refusal to cooperate with an order to test for these substances.
60 Wet van 24 juni 1998, Staatsblad 1998, 375.
61 *See*, *e.g.*, De Hullu & Wedzinga 1997.
62 Wet van 22 december 2005, Staatsblad 2006, 11.

carries, as we have already seen, a maximum prison term of four years in case of recklessness (Article 307.2 CC), while causing serious injury by recklessness carries a maximum prison term of two years (Article 308.2 CC).

One can easily see that the legislator in 2006 only partially met the above-mentioned critique triggered by the amendment of 1998.[63] The legislator did try to restore the balance of the maximum prison terms of the various negligent offences, both in the Criminal Code and the RTA, by reducing the differences between the maximum sentences. But the way in which this was accomplished, in fact runs diametrically counter to the critics' message. The legislator chose not to lower the maximum prison term of nine years' imprisonment for the most serious negligent traffic offence; instead, he increased the maximum prison term for the general negligent offence of Article 307 CC. Furthermore, the legislator did acknowledge that other factors than driving under influence and speeding should have an aggravating effect. But as a solution, the legislator did not choose to introduce either more specific aggravating factors or just one general aggravating factor encompassing all kinds of factors; instead, he inserted recklessness as a general aggravating factor, on top of which other specific factors can have an even more aggravating effect.

Leaving these issues aside, from a substantive law perspective the amendment of 2006 raises two questions in particular. How is the new concept of recklessness to be distinguished from plain negligence? And how does recklessness relate to the specific aggravating factors, like driving under influence and speeding?

2.5.2 Meaning of Recklessness

Recklessness is a form of negligence, and with its introduction, the legislator did not want to alter the boundary between (conditional) intent and negligence. According to the explanatory memorandum, the legislator intended to introduce a separate maximum penalty for recklessness "to make adequate punishment possible in all cases of very negligent behaviour whereby the perpetrator deliberately and with serious consequences has taken unacceptable risks. Recklessness thus requires not only gross negligence, but a very serious lack of care. In other words, it is the most serious reproach that someone can be made within the limits of a negligent offence."[64]

In this passage, the bar for establishing recklessness seems to be set rather high. Still, this passage raises questions. What is meant by 'deliberately taking unacceptable risks'? Does the legislator want to restrict recklessness to conscious negligence? And what kind of behaviour constitutes 'a very serious lack of care'? The examples given in the explanatory memorandum do not contribute to a clear picture. As a "possible case" of recklessness, it mentions the situation where someone is reading a map while driving with the consequence that the person overlooks a priority road.[65] Considering this a case of recklessness may, in view of the

63 De Jong *et al.* 2003, p. 261.
64 Kamerstukken II, 2001-2002, 28484, no. 3, p. 12.
65 Kamerstukken II, 2001-2002, 28484, no. 3, p. 12.

aforementioned description, come as a surprise. The explanatory memorandum also reads that driving under the influence of alcohol or driving much too fast will "easily" constitute recklessness.[66] This may seem less surprising, but at the same time raises another question, because driving under influence and driving much too fast as such are already aggravating factors (Article 175.3 RTA), multiplying the maximum penalty by 1.5: how then do these specific aggravating factors relate to the general aggravating factor of recklessness, which doubles the maximum sentence? The memorandum thus perfectly illustrates the aforementioned problems: how to delineate recklessness from plain negligence (what is the lower limit of recklessness?) and what is the relation between the specific aggravating factors and recklessness?

Case law so far shows that the concept of recklessness is far from clear. In quite a few cases, the Supreme Court quashed convictions for recklessly causing a serious accident; in most of these cases, the Court's view differed also from the advocate general's advisory opinion to the Court. Recently, on 15 October 2013, the Supreme Court ruled in four cases concerning recklessness, in all of which the lower court had convicted the defendant. In these decisions, the Court tries to shed some light on the concept. The Court begins by stating that, as with plain negligence, the Supreme Court is only allowed to determine whether recklessness, as proved, could be inferred from the evidence that is ascertained by the lower court, and that, again as with plain negligence, it all comes down to the defendant's actions considered in their entirety, their nature and severity and the other circumstances of the case. Furthermore, it should be borne in mind, according to the Supreme Court, that in the legislative history recklessness is considered the most serious form of negligence, leading to a doubling of the maximum penalty. The Court then continues:

> 3.3. [...] Partly with a view to the penalty-increasing effect of this factor, the establishment of recklessness, being the most severe form of negligence, should definitely conform to certain standards, and where appropriate, the judge should specifically give further attention to his reasoning of the finding of recklessness. This also applies in cases where recklessness essentially consists of acts as set out in Section 3 of Article 175 RTA, since these acts constitute a ground for further increase of the maximum penalty applicable to recklessness according to Section 2 of that article.[67]
> 3.4. The foregoing implies that the question whether there is recklessness in the sense of Section 2 of Article 175 RTA in a specific case requires an assessment of the particular circumstances of that case. In assessing an appeal in cassation directed against decisions in specific cases, the Supreme Court can clarify the meaning of the concept of recklessness only to a certain extent. In assessing such cases, it may play a role whether the court has provided its decision that there is recklessness [...] with an additional reasoning which recognizes the specific nature of the element of

66 Kamerstukken II, 2001-2002, 28484, no. 3, p. 13.

67 The Court already used these wordings in earlier rulings (*e.g.* Supreme Court 22 May 2012, ECLI:NL:HR:2012:BU2016).

> recklessness. After all, being the most serious *mens rea* form, bordering on intent, recklessness will only be present in exceptional cases. Furthermore, it should be noted that the specific legal meaning of 'recklessness' does not necessarily coincide with the meaning of 'recklessness' – in the sense of 'rash' – in common parlance.
> 3.5. To establish recklessness [...] in a specific case, the court must determine facts and circumstances from which it can be inferred that the defendant has created a very serious danger by extremely negligent behaviour, and that the defendant was aware of this or at least should have been.
> From the considerations under 3.3, it follows that in this regard the mere finding that the defendant has committed one or more of the acts mentioned in Section 3 of Article 175 RTA, which independently lead to an increase of the maximum penalty, does not suffice in general.[68]

From these considerations, it appears that the Supreme Court sets the bar high and chooses a restrictive interpretation of the concept of recklessness. More specifically, the Court clarified the relationship between recklessness (Article 175.2 RTA) and the other, specific aggravating factors (Article 175.3 RTA), in that recklessness cannot be inferred from the mere presence of one or more of these specific aggravating factors, like speeding and driving under influence. Indeed, this is only fair; if the mere presence of such a factor could give rise to the judgment that the perpetrator drove recklessly, this seems a case of double accounting.[69]

It is also clear from the considerations that recklessness is not restricted to conscious negligence (the defendant "was aware" of a serious danger or "at least should have been"). The most important question, then, is the meaning of the phrase that recklessness requires the causing of "a very serious danger by extremely negligent behaviour". What constitutes *extremely* negligent behaviour? And how does the requirement of "a very serious danger" relate to the conditional intent term of a 'substantial chance' (the meaning of which is not crystallized yet either). One may think that the first term is even stricter than the latter, but that would be quite remarkable, since it would mean that the degree of danger required for recklessness – a form of negligence – is higher than that required for conditional intent.[70] Comparing the two is difficult anyhow, because the Court does not indicate the object of the very serious danger: is it about danger for a traffic accident or for a person's life?

In any case, looking at the concrete decisions in the four cases, it appears that the threshold of causing 'a very serious danger by extremely negligent behaviour' is not easily met; the Supreme Court takes a restrictive view on recklessness. Probably the least remarkable decision – i.e. in view of the Court's general obser-

68 Supreme Court 15 October 2013, ECLI:NL:HR:2013:959; Supreme Court 15 October 2013, ECLI:NL:HR:2013:960; Supreme Court 15 October 2013, ECLI:NL:HR:2013:962; Supreme Court 15 October 2013, ECLI:NL:HR:2013:964.

69 There is another cause for concern: drink-driving is an aggravating factor even if the intoxication has not contributed to the accident in any way (no causal relationship is required).

70 Under Dutch law, conditional intent includes an objective component. 'Consciously accepting a substantial chance of causing the consequence' requires also the actual presence of this substantial chance.

vations – concerns a driver who violated the speed limit to a serious extent, while his blood alcohol level was 0.126% (the legal limit being 0.05%; *see* Section 2.3.1). He had not reduced his speed when he drove onto a junction on which the traffic lights were green for him, and caused a deadly accident with a bicyclist. According to the Supreme Court, recklessness could not be established on these facts.[71] In another case, in which the lower court's conviction was upheld, the defendant was engaged with another driver, amidst other road users, in a cat-and-mouse game. While exceeding the speed limit – 115 km/h where 50 km/h was allowed – he ran a red light and drove onto a junction. This resulted in a collision with another car, which cost the lives of its passengers. The Supreme Court upholds the conviction and explicitly refers to the fact that the lower court provided its finding of recklessness with an additional reasoning.[72]

More significant was the outcome of the other two cases, of which one is particularly noteworthy. The driver of a delivery van, driving on the lane for oncoming traffic, tried to overtake the defendant's car. The defendant accelerated and prevented the delivery van from returning to its own – right – lane. While trying to go back to his lane – the driver of the van noticed oncoming traffic – the cars made contact. The defendant's car ended up on the left lane, where it collided with an oncoming car. As a result, the passenger of the oncoming car died, while its driver sustained serious injury. The lower court convicted the defendant for recklessness, but the Supreme Court deemed the evidence insufficient.[73] This may come as a surprise. Is this not a case of causing a very serious danger by extremely negligent behaviour? However, drawing far-reaching conclusions from this ruling might be premature. The Supreme Court also remarked that the lower court, unlike with the previous case, "did not provide the evidence with an additional reasoning which recognizes the specific nature of the element of recklessness" (the lower court only enumerated the pieces of evidence).[74] This remark should probably be considered as a hint to the lower courts: it may very well be that the Supreme Court would have upheld the conviction if the lower court had explained why, in its view, the defendant behaved extremely negligently and thereby caused a very serious danger. Still, requiring such an additional reasoning in a case like this – apparently, the facts as shown by the evidence did not speak for themselves – is in itself revealing as regards the Supreme Court's strict view on recklessness.

2.6 Gaps in Dutch Criminal Traffic Law?

2.6.1 Harmful Consequences and Mens Rea

As we have seen, Dutch criminal traffic law provides for different kinds of offences. With respect to the specific offences (speeding etc.) and the general

71 Supreme Court 15 October 2013, ECLI:NL:HR:2013:964.

72 Supreme Court 15 October 2013, ECLI:NL:HR:2013:959. For a similar case (a racing game), *see* Supreme Court 3 December 2013, ECLI:NL:HR:2013:1554.

73 Supreme Court 15 October 2013, ECLI:NL:HR:2013:960.

74 *Cf. also* the third case mentioned in note 68: Supreme Court 15 October 2013, ECLI:NL:HR:2013:962.

offence of endangering traffic (Article 5 RTA), neither consequences in the form of death, serious bodily injury or even an accident, nor *mens rea* in the form of intent or negligence play a role (only blameworthiness is required). Both characteristics explain the relatively low maximum prison term of – in general – two months of imprisonment. On the other hand, we have the negligent traffic offence of Article 6 RTA and the general intentional offences like intentional homicide and intentionally causing (serious) injury. These offences require a form of *mens rea* and (severe) consequences, with the exception of attempted homicide and the attempt to cause serious bodily injury. From this spectrum of offences, it appears that the law focusses primarily on serious consequences provided the *mens rea* is at least *culpa lata*, while in case serious consequences are lacking *mens rea* is not required, only blameworthiness.[75] Thus, Dutch criminal traffic law does not provide for *specific* criminalizations for all kinds of dangerous traffic behaviour. For example, causing less serious consequences – material damage or non-serious bodily injury – by negligent dangerous traffic behaviour is not a separate offence (although these scenarios will usually be covered by a specific traffic regulation or by the general provision of Article 5 RTA).[76] In the following, I will confine myself to two other forms of dangerous traffic behaviour that are not specifically criminalized, in short causing a serious traffic accident by behaviour that falls short of negligence and intentional or negligent dangerous traffic behaviour not leading to serious consequences.

2.6.2 *Causing a Serious Accident by* Culpa Levis

Causing a serious accident resulting in death or serious injury in a way that does not meet the threshold of *culpa lata*, gross negligence, does not come within the ambit of Article 6 RTA. It may fall under the general prohibition of causing danger (Article 5 RTA) or a specific provision, in which case the maximum penalty is only two months of imprisonment. It has been suggested to criminalize causing a serious accident by *culpa levis* as a *misdemeanour*, carrying a higher maximum sentence than two months.[77] *Culpa levis* would mainly relate to negligence in the form of (momentary) inattention.

This suggestion has several backgrounds. In the past – before the Winssen ruling in 2004[78] and the Geervliet ruling in 2008[79] – it was motivated by the idea that in practice proof of negligence is too easily assumed. Seen from a substantive law perspective, the concept of *culpa lata* was eroded: criminal negligence *was* in fact *culpa levis*. If *culpa levis* ought to be criminalized at all, the reasoning was, at least it should not be labelled as a felony.[80] Another argument is also prompted

75 *See also* Duker, this book, Chapter 7.

76 This is in line with the Criminal Code, which does not provide for *general* criminalizations of negligently causing material damage or negligently causing non-serious bodily injury.

77 Van Veen 1974, p. 146; Vellinga 1979, p. 199.

78 *See* Section 2.4.1.

79 *See* Section 2.4.2.

80 Vellinga 1979, p. 199. Another proposal, based on the same premise that in practice negligence need not always be gross, tries to keep the concept of negligence – as one sees it – undiluted.

by practice, not of Article 6 RTA, but of Article 5 RTA.[81] If the court, in case the defendant caused a serious accident, does not find a violation of Article 6 proved because the defendant did not act *grossly* negligent, the defendant is usually convicted for the lesser offence of Article 5 RTA. And although this provision only prohibits causing danger, it appears that in such cases courts tend to take the consequence (materialization of the danger into a serious accident) into account when passing sentence. Thus, in a way, the offender is really convicted for the (non-existent) offence of causing a serious traffic accident by *culpa levis*. This may be considered an improper use of Article 5 RTA. At the same time, one could say that this practice indicates the need for such an offence. Indeed, when dangerous driving has led to a serious accident, there is something surreal about prosecuting for the offence of – merely – causing danger, because for the perpetrator as well as for the victim or surviving relatives the result is inextricably linked to the offence. On the other hand, one could ask whether attributing liability for causing unwanted consequences, even very serious ones, by *culpa levis* should be dealt with by *criminal* law.[82] In the Netherlands, where the punishability of certain variants of unconscious negligence, in particular momentary inattention, has always been much debated,[83] this may be a step too far.

2.6.3 Dangerous Traffic Behaviour Without (Serious) Consequences

Under Dutch law, driving dangerously not resulting in an accident can only constitute a traffic misdemeanour, irrespective of the *mens rea* of the perpetrator (with the exception of an attempted intentional offence). Is that satisfactory? Is it not strange that the driver in the Porsche case (*see* Section 2.3.2), where intent with regard to the deaths could not be established, could not have been sentenced to more than a few months of imprisonment if nothing had gone wrong?

This focus on actual harm in the context of criminal traffic law is in itself in line with the general approach in criminal law. In Dutch law, felonies often require an actual injury of the protected interest. Still, there are exceptions. As regards felonies in the Criminal Code, an important exception, besides attempt liability, is formed by the group of offences that concern endangering the general safety of persons and property. This group is all the more interesting, since the traffic offence of Article 6 RTA is essentially an offence endangering the general safety of persons, apart from the fact that Article 6 RTA requires that the danger has materialized. An example of an offence belonging to this group is causing a fire resulting in an actual danger to objects or a person. Although this danger is an

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Negligence in criminal law should remain reserved for gross negligence. When practice shows that negligence need not be gross, then, for the sake of doctrinal clarity, the concept should not be used and the crime of negligently causing injury or death in traffic should be replaced by another legal construction. The proposed alternative is to turn this negligent crime into a result-qualified offence: violating a concrete traffic regulation (like speeding or running a red light) resulting in serious injury or death. *See* De Jong 1999b, p. 832.

81 Duker 2012, p. 323.

82 Duker 2012, p. 325.

83 De Jong *et al.* 2003, p. 266; Robroek 2010.

objectified consequence of the conduct (with regard to the endangerment neither intent nor negligence is needed), the maximum sentences are quite severe. In case of *intentionally* causing a fire, the maximum sentence increases from twelve years' imprisonment when goods are endangered to fifteen years when another person's life is endangered and even to thirty years or a life sentence when death ensues (Article 157 CC); in case of *negligently* causing a fire, the maximum penalties are six months, one year and two years respectively (Article 158 CC). These maximum prison terms for the negligent offence are significantly higher than the two months' term accompanying the conduct traffic offences. At the same time, these terms are much lower than the maximum terms for the negligent traffic offence. Seen in that light, the maximum prison term of nine years accompanying the most serious variant of the negligent traffic offence stands even more out.[84]

Outside the Criminal Code, some areas of criminal law adopt a totally different approach. For example, liability for economic offences and drug offences does not depend on the occurrence of results in the form of violating or even endangering the underlying protected legal interest. The qualification of such an abstract endangerment offence as a misdemeanour or a felony, and the maximum penalty that comes with this qualification, depends solely on the absence or presence of intent. *Mere* possession of hard drugs, for example, is a misdemeanour, carrying a maximum sentence of six months; *intentional* possession – the perpetrator knows or at least consciously accepts the substantial chance he is in the possession of hard drugs (which is, of course, usually the case) – constitutes a felony, carrying the much higher maximum prison sentence of six years.[85] Of course, there is an important difference between drug offences and traffic offences. Unlike with traffic offences, it is hardly conceivable to link liability for drug offences to the occurrence of danger or violation of the protected interest. Making 'selling drugs endangering public health' an offence seems rather strange. In the context of drug offences, differentiation between felonies and misdemeanours via a *mens rea* requirement seems the only feasible option.

It shows that some categories of offences carry substantial maximum sentences even when the protected interest need not be violated nor even endangered. Furthermore, traffic law may have its own reasons not to focus too much on the consequences, in particular a result in the form of death or serious injury, or even an accident.[86] Firstly, dangerous traffic behaviour is at the order of the day, but seldom leads to serious consequences. It is mainly random whether dangerous driving leads to an accident ('bad luck'). Secondly, whether an accident results in death or injury is also to a high degree dependent on factors – construction of vehicles, crumple zone, protective measures taken by other road users – which the dangerous driver does not control.

84 De Jong *et al.* 2003, pp. 263-264. Strangely enough, while the 2006 amendment increased the maximum prison term for negligent homicide and negligently causing serious injury, and introduced recklessness as an aggravating factor (resulting in a total increase from nine months to four years and from six months to two years respectively), the maximum prison terms for offences with respect to endangering the general safety of persons were left unchanged.

85 Article 10.3 Opiumwet (Narcotics Act).

86 *See* Vellinga 2012, pp. 181-182.

In light of the above, it indeed seems unsatisfactory that in case traffic behaviour did not lead to a person's death or injury, or even an accident, the only available provisions are traffic misdemeanours, carrying a relatively low maximum sentence.[87] The solution can be found in several options, in which both the required form of *mens rea* (intent or negligence) and the required danger (danger for a person's life, danger for an accident) are important parameters.

2.7 Conclusion

As regards *serious* traffic offences, defined as dangerous traffic behaviour that carries a substantial maximum penalty, Dutch law contains really only one specific provision: negligently causing a traffic accident in which another person is killed or sustains serious bodily injury (Article 6 RTA). This state of affairs as well as the content and the accompanying maximum prison terms of this sole provision raise several issues.

As regards its content, a distinctive feature of the provision is that its key element – negligence – is a complicated concept, which raises, amongst others, the difficult question of the lower limit of negligence. This demarcation problem is probably even harder to solve under Dutch law, since criminal negligence stands for *culpa lata*, gross negligence, and thus has to be demarcated from *culpa levis*. Although the case law of the Supreme Court does lend some guidance, in practice the courts continue to struggle with this problem. And the introduction of recklessness as an aggravating factor within the concept of negligence has created a new demarcation problem: establishing the boundary between plain negligence and recklessness. Although it is certain that the Supreme Court has taken a very restrictive view on recklessness, future case law must clarify the dividing line further.

With regard to the sentence, the offence of Article 6 RTA stands out as far as the maximum prison term is concerned. In case of negligently causing death the maximum term is three years (serious bodily injury: one and a half year); with recklessness these maximum terms are multiplied by a factor two, and when a specific aggravating factor applies the multiplying factor is one and a half. In its most serious variant, the maximum prison term is thus nine years. These prison terms differ to a great extent from the terms that accompany the general negligent offences like negligent homicide (two years with respect to plain negligence and four years with respect to recklessness). There is also a significant difference with the group of negligent offences that concern endangering the general safety of persons and property, criminalized in the Criminal Code, especially since the offence of Article 6 RTA could be considered such an offence. The maximum prison term for these offences, in its most serious form, does not exceed two years.

Finally, there is the position of Article 6 RTA amongst the other offences applicable in traffic situations. Article 6 RTA is the only *serious* traffic offence (in the sense that it carries a substantial maximum prison term). However, it only comes

87 Vellinga 1979, p. 199; Vellinga 2012, p. 197.

into play when dangerous traffic behaviour results in serious consequences, i.e. an accident leading to death or serious bodily injury. In particular with regard to dangerous *traffic* behaviour, one may ask whether this focus on serious consequences is in place.

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Chapter 3

Serious Driving Offences in England and Wales

Sally Kyd Cunningham[*]

3.1 Introduction

The law of England and Wales (E&W)[1] is governed by common law, meaning that many offences are not defined by statute but originate from case law. This is true of the two main homicide offences in E&W: murder and (involuntary) manslaughter. However, in recent years a number of statutes have created serious driving offences, including several offences of causing death by driving. This chapter will begin by setting out the homicide offences that exist in E&W that might be applicable where a death is caused on the roads. It then reports on recent developments in relation to one of the fundamental legal principles that applies to shape the criminal responsibility of those who cause death on the roads: the doctrine of causation. Finally, some background to the way in which these offences are investigated will be provided.

It should be noted at the outset that in E&W, the public prosecuting body, the Crown Prosecution Service (CPS), operates under the opportunity principle, rather than the legality principle,[2] and enjoys a considerable degree of discretion in relation to whether or not to prosecute suspected offenders. When receiving a file of evidence from the police, a CPS lawyer will apply two tests to the case to decide whether to prosecute and if so what offence to charge. These tests are the evidential test and the public interest test, as set out in the Code for Crown Prosecutors. The evidential test requires sufficient evidence to provide a realistic prospect of conviction, and it is this test which usually determines whether a prosecution will take place, since in most cases of fatal collisions it will be deemed in the public interest to prosecute any case where the evidential test is passed. The only exception might be in a case where the deceased is a close relative of the defendant.[3]

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1 This chapter is confined to the jurisdiction of England and Wales and does not extend to other parts of the United Kingdom, such as Scotland and Northern Ireland, which have their own criminal justice system and/or criminal offences. 'English law' in this chapter is intended to mean 'the law of England and Wales'.

2 *See* Fionda 1995.

3 Crown Prosecution Service 2013.

3.2 Common Law Homicide Offences

3.2.1 Murder

Murder under English law involves an unlawful killing by a defendant (D) of another human being (V) with the *mens rea* of malice aforethought. Malice aforethought means intention to kill or intention to cause grievous bodily harm.[4] Intention under English law can be either direct or oblique (indirect). Direct intention is present where the prohibited result (in this case death or grievous bodily harm) is D's aim or objective in acting. Oblique intention is present when D acts knowing, but not necessarily wanting, the result to come about. The current case law requires that D foresee the result as a virtual certainty before D can be convicted of murder.[5] Murder carries a mandatory life sentence.

3.2.2 Manslaughter

Where D foresees death or grievous bodily harm as a possible result of D's actions, but that foresight falls short of a virtual certainty, D will be liable for manslaughter.[6] Manslaughter is also committed where D commits an unlawful and dangerous act which causes death. This species of manslaughter, known as 'constructive' manslaughter, will only be committed by a driver where the unlawful act causing death is to use the vehicle as a weapon of offence in assaulting V and, in doing so, kills. It is not possible to prosecute the offence on the basis that D committed the unlawful act of, for example, dangerous driving, and caused death. It was decided almost eighty years ago that for the purposes of the offence of constructive manslaughter, the act must be criminal for some other reason than that it has been negligently performed.[7] The reason for this is that were it otherwise, any driver who committed an infringement of the law (e.g. driving without due care and attention or drink-driving) would necessarily have committed manslaughter.

In a case of a death being caused by bad driving, the most applicable species of manslaughter available is that of gross negligence manslaughter. This version of the offence is governed by the House of Lords judgment in *Adomako*,[8] in which the following requirements were established before a conviction will result:

1. D must owe a duty of care to V;
2. D must breach that duty;
3. The breach of duty caused V's death;
4. The breach must amount to gross negligence.

4 *Vickers* [1957] 2 QB 664; *Cunningham* [1982] AC 566.
5 *Woollin* [1999] 1 AC 82.
6 *Lidar* (1999) LTL November 12, 1999.
7 *Andrews v DPP* [1937] AC 576.
8 [1995] 1 AC 171.

In a case of causing death by driving, it is the last requirement that provides the hurdle to be overcome in proving a case of manslaughter. Whether negligence is 'gross' is an entirely objective test, requiring the jury to assess whether, having regard to the risk of death, the conduct was so bad in all the circumstances to be criminal. This has been criticised as a circular test, and in the context of bad driving is only likely to be met where "The driving fell far below the minimum acceptable standard of driving such that there was an obvious and serious risk of death".[9] The CPS states that "Gross negligence manslaughter should not be charged unless there is something to set the case apart from those cases where a statutory offence such as causing death by dangerous driving or causing death by careless driving could be proved. This will normally be evidence to show a very high risk of death, making the case one of the utmost gravity."[10] This form of manslaughter is occasionally referred to as 'motor manslaughter', although there is no specific separate offence of that name, and 'motor manslaughter' merely refers to a case of manslaughter where the mode of killing involved the use of a motor vehicle.

Manslaughter carries a maximum penalty of life imprisonment. However, it is very rarely charged in cases of road death,[11] because it is seen to be difficult to prove, and because of the existence of the statutory causing death offences, which are seen as easier to prove[12] and which themselves carry considerable custodial penalties. It is these offences to which we will now turn.

3.3 Statutory Causing Death by Driving Offences

Four 'causing death by driving' offences now exist under the Road Traffic Act 1988, as amended: causing death by dangerous driving (CDDD); causing death by careless driving (CDCD); causing death by careless driving whilst under the influence of drink or drugs (CDCDUI); and causing death by driving whilst uninsured, unlicensed or disqualified (CDUD). The basic requirements of each offence will be provided, with some reference to the applicable penalties. Each of these offences is constructive in nature, meaning that a 'causing death' offence has been built on top of a pre-existing conduct offence to create a new result crime. One of the features of these offences is that nothing more is required in terms of *mens rea* beyond that needed to prove the underlying offence. Consequently, it is possible for a driver to be liable for any of these offences without realising that his or her driving involved a risk of death or of any harm at all. In relation to the first three causing death offences, D will be measured against the standard of the competent and careful driver in establishing whether D was sufficiently blameworthy to be liable for the death. In relation to the fourth offence (CDUD), the offence is one of strict liability insofar as D need not realise D is committing the underlying offence

9 Crown Prosecution Service 2013.
10 Crown Prosecution Service 2013.
11 *See* Cunningham 2001.
12 *See* Crown Prosecution Service 2013.

(driving whilst uninsured, unlicensed or disqualified) and it need not be proved that even a competent and careful driver would have realised there was the risk of a collision.

3.3.1 Causing Death by Dangerous Driving (CDDD)

Causing death by dangerous driving was the first of the offences to be created, although when it first appeared on the statute books in 1956, it existed in its first incarnation as causing death by reckless *or* dangerous driving. The catalyst for a change in the law to create a specific offence of causing death by driving was that it was feared that many drivers who killed whilst driving badly escaped liability for manslaughter because juries were reluctant to convict a fellow driver of such a serious crime. The new offence met with some criticism, but survived in one shape or another, with the Criminal Law Act 1977 abolishing the offences of dangerous driving and causing death by dangerous driving, but preserving the offence of causing death by reckless driving.

Difficulties in defining recklessness as a form of *mens rea*, particularly following the decision of the House of Lords in *Seymour*,[13] meant that the offence was fairly short-lived in that form. Here, the House of Lords addressed the question of the necessary *mens rea* to be proved in cases of motor manslaughter (prior to the Court settling on gross negligence as the relevant test later in *Adomako*). The result of *Seymour* was that the *mens rea* element of both the statutory offence of causing death by reckless driving and common-law manslaughter was the same: objective recklessness. This, according to the cases of *Caldwell*[14] and *Lawrence*[15] required that D had created an obvious and serious risk of causing the harm and that D either gave no thought to the possibility of such a risk or, having recognised that there was some risk involved, had nonetheless gone on to take it. Given the complete overlap between the two offences (motor manslaughter and causing death by reckless driving), the practice became that alternative charges relating to the two offences should not be brought. It became common for the statutory offence to be charged rather than manslaughter, although even with the statutory offence the prosecution sometimes found it difficult to secure a conviction thanks to the test of objective recklessness, which was seen as setting the bar for *mens rea* too high.

These problems were addressed by the Road Traffic Act 1991, which amended the Road Traffic Act 1988 to replace causing death by reckless driving with causing death by dangerous driving, forming the current law. Section 1 of the Road Traffic Act 1988 states that:

> A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

13 [1983] 2 AC 493.
14 [1982] AC 341.
15 [1982] AC 510.

Section 2A of the 1988 Act sets out the definition of dangerous driving, one of the main elements of the CDDD offence. Driving is dangerous if:

> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

'Dangerous' means that the driving creates a risk of injury to any person or of serious damage to property.[16] Thus, CDDD is committed where D drives far below the standard of a competent and careful driver and is involved in a collision, as the result of which V dies.

The CPS provides guidance to prosecutors on the meaning of dangerous driving, as derived from case law. This was recently updated in 2013, and starts by stating that:

> Dangerous driving includes situations where the driver has of his or her own free will adopted a particular way of driving, and also where there is a substantial error of judgement, that, even if only for a short time, amounts to driving falling far below the required standard. If the driving that caused the danger was taken as a deliberate decision, this would be an aggravating feature of the offence.[17]

It is clear from the case law that for D to be liable for dangerous driving (and by extension, for CDDD), it is not necessary to prove that D made a conscious decision to drive in a particular way, or that D was aware of a mistake or error of judgement that D has made which creates the risk to others. It is an entirely objective test, and it is enough that *any* competent and careful driver in that position *would* have realised that the driving was dangerous.

That the test leaves no room to take into consideration the particular level of driving experience of D was recently confirmed in the case of *Bannister*,[18] overruling *Milton v CPS*.[19] Both cases involved police officers found to have been driving at grossly excessive speeds[20] late at night and who were, as a result, prosecuted for dangerous driving. The Court of Appeal in *Milton* found that the judge had been wrong to rule that D's level of training was irrelevant to the test of whether D had driven far below the standard of the competent and careful driver. It was held that in determining what was expected of, or obvious to, a competent and careful driver, the court should have regard to any circumstance relevant to the issue of dangerousness which was within the knowledge of the driver, whether or not it

16 Road Traffic Act 1988, Section 2A(3).
17 Crown Prosecution Service 2013.
18 [2009] EWCA Crim 1571.
19 [2007] EWHC 532 (Admin).
20 Milton drove at 148 mph in a 70 mph limit, at 114 mph in a 60 mph limit and at 60 mph in 30 mph limits. Bannister was found to be driving at 113 mph in a 70 mph limit when he span out of control and crashed.

was unfavourable to the defendant. Consequently, the fact that D was a grade 1 advanced police driver was a circumstance to which regard should be had when deciding whether he had driven dangerously.

Despite the Court insisting that to take D's training into account did not detract from the objectivity of the test, there is little doubt that such reasoning was flawed. This was corrected in *Bannister*, in which D appealed against his conviction for dangerous driving on the basis that it was relevant that he had completed an advanced training course which had enabled him to drive safely at high speed in the prevailing conditions, even if it would not have been safe for the ordinary competent and careful driver. The Court of Appeal, whilst allowing the appeal for a separate reason, took the opportunity to overrule *Milton*, reaffirming the need for an entirely objective test which is not to be individualised to any degree. It was held that to take into account the special skill of a driver would be to substitute the test of the ordinary competent and careful driver set out in Section 2A and in effect to re-write the test Parliament had clearly laid down. It is now clear that the special skill, or lack of skill, of a driver is an irrelevant circumstance when considering whether the driving was dangerous.

Nevertheless, the fact that the law on this point has been clarified does not necessarily make the test one that is easy to apply. The fact-finder (district judge or bench of lay magistrates in the magistrates' court or the jury in the Crown Court) must assess D's driving in accordance with what might be almost seen to be an imaginary individual; someone who drives in such a way that presumably they would pass the driving test if assessed, but who has no further training or advanced ability. What no doubt they *actually* do is to compare D's driving against the standard of driving that they commonly experience on the roads, or which they themselves display. Given that they might not be particularly competent or careful themselves, this could prove problematic.[21] A particular challenge for fact-finders in applying the test is to judge how a specific defendant who, because of his or her profession, drives in a way with which the fact-finder does not readily identify, ought to be assessed. Although it may be straightforward to reach the conclusion that it would be dangerous for anyone to drive at over 100 mph on a single carriageway, whether or not they have received advanced driver training, it might be more difficult to assess how the driver of a heavy goods vehicle or some other vehicle which actually requires additional driver training before it can be driven legally ought to have responded to a particular risk. A driver who can be said to be competent and careful in driving a motor car would not necessarily be able to drive a vehicle with which he or she was not familiar without further training, making the objective test almost nonsensical.

How is CDDD prosecuted? In terms of examples of driving which provide evidence of dangerous driving in that it is likely to fall *far* below the standard of a competent and careful driver and creates a risk of harm to others, the CPS provides the following:

21 For further discussion, *see* Cunningham 2007, Chapter 6.

- racing or competitive driving;
- failing to have a proper and safe regard for vulnerable road users such as cyclists, motorcyclists, horse riders, the elderly and pedestrians or when in the vicinity of a pedestrian crossing, hospital, school or residential home;
- speed, which is highly inappropriate for the prevailing road or traffic conditions;
- aggressive driving, such as sudden lane changes, cutting into a line of vehicles, or driving much too close to the vehicle in front;
- disregard of traffic lights and other road signs, which, on an objective analysis, would appear to be deliberate;
- disregard of warnings from fellow passengers;
- overtaking which could not have been carried out safely;
- driving when knowingly suffering from a medical or physical condition that significantly and dangerously impairs the offender's driving skills such as having an arm or leg in plaster, or impaired eyesight. It can include the failure to take prescribed medication;
- driving when knowingly deprived of adequate sleep or rest;
- driving a vehicle knowing it has a dangerous defect or is poorly maintained or is dangerously loaded;
- using a hand-held mobile phone or other hand-held electronic equipment whether as a phone or to compose or read text messages when the driver was avoidably and dangerously distracted by that use;
- driving whilst avoidably and dangerously distracted such as whilst reading a newspaper/map, talking to and looking at a passenger, selecting and lighting a cigarette or by adjusting the controls of electronic equipment such as a radio, hands-free mobile phone or satellite navigation equipment;
- a brief but obvious danger arising from a seriously dangerous manoeuvre. This covers situations where a driver has made a mistake or an error of judgement that was so substantial that it caused the driving to be dangerous even for only a short time.[22]

As will be seen in the next section, there is some overlap between the examples provided of dangerous driving and those of careless driving. The CPS is keen to stress that each case is unique and decisions as to charge are to be made on a case-by-case basis. As CDDD is an indictable only offence, meaning that it will always be tried at the Crown Court, the question whether a piece of driving is to be classified as 'dangerous' or not will always be determined by the twelve members of a jury, unless D agrees to plead guilty to the offence.

The maximum penalty for CDDD is fourteen years' imprisonment, the highest fixed term penalty that exists in E&W (but not the only offence to which it is applied). A definitive sentencing guideline exists for all causing death by driving offences,[23] as discussed by Marius Duker in Chapter 7 of this book. The guideline for each offence is structured in a similar way, with an offence falling within one of three 'classes', each of which has a different starting point and sentencing range

22 Crown Prosecution Service 2013.

23 Sentencing Guidelines Council 2008.

within the maximum sentence provided by statute. Where more than one person is killed, for example, this will be an aggravating factor in sentencing, potentially moving the offence up a class, but any sentence imposed for multiple deaths resulting from the same collision will be served concurrently rather than consecutively,[24] meaning that the sentence will not exceed fourteen years for CDDD. As for a minimum sentence, CDDD carries mandatory disqualification for a minimum period of twelve months,[25] which must be followed by an extended driving test before D can regain his or her licence.[26]

3.3.2 Causing Death by Careless Driving (CDCD)

Until 2008, if a driver drove badly and caused the death of another person on the road and his or her driving failed to meet the test of falling *far* below the standard of a competent and careful driver, D would be convicted of the offence of driving without due care and attention, otherwise known as careless driving. That is a minor offence, in that the penalty is a fine and/or points on the driver's licence, with no potential for a prison sentence. It was felt that the gap in sentencing between careless driving and CDDD was too great, and so the Road Safety Act 2006 created the offence of causing death by careless (or inconsiderate) driving, which came into force in August 2008. The offence is triable either way, which means that less serious cases can be dealt with in the magistrates' court and more serious cases will be sent up to the Crown Court, where the maximum sentence on conviction is five years' imprisonment.

The offence is defined under Section 2B of the Road Traffic Act 1988, inserted by the Road Safety Act 2006, Section 20:

> *2B Causing death by careless, or inconsiderate, driving*
> A person who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, is guilty of an offence.

Again, it is then necessary to look elsewhere in the statute for a definition of the underlying conduct offence. Careless driving is now defined under Section 3ZA of the Road Traffic Act 1988:

> (2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver.
> (3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to

24 *Noble* [2003] 1 Cr. App. R. (S.) 65.
25 Road Traffic Offenders Act 1988, Section 34.
26 Road Traffic Offenders Act 1988, Section 36.

> the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

As with dangerous driving, this is an objective test, with the key to the offence being whether D's driving has fallen below the standard of a competent and careful driver, but not whether it is far below that standard. Unlike dangerous driving, however, there is no requirement that any risk of harm would have been obvious to a competent and careful driver.

It is also technically possible to prove the offence of CDCD on the basis of inconsiderate, rather than careless, driving. However, empirical research conducted by the author has encountered not one single case of CDCD argued on this basis, which is not surprising given the test for inconsiderate driving under Section 3ZA Road Traffic Act 1988:

> (4) A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.

This hardly conveys the wrongdoing of driving that is likely to give rise to a fatal collision. To describe a victim of a fatal collision as having been 'inconvenienced' is to mislabel the conduct of the driver responsible. It is hard to conceive of a collision in which D could be said to have driven in a way which did not show reasonable consideration for other persons, but yet where the driving did not fall below the standard of a competent and careful driver and thus warrant the alternative label of careless driving. The CPS provides the following examples of behaviour that could amount to inconsiderate driving:

- flashing of lights to force other drivers in front to give way;
- misuse of any lane (including cycle lanes) to avoid queuing or gain some other advantage over other drivers;
- unnecessarily remaining in an overtaking lane;
- unnecessarily slow driving or braking without good cause;
- driving with un-dipped headlights which dazzle oncoming drivers, cyclists or pedestrians;
- driving through a puddle causing pedestrians to be splashed;
- driving a bus in such a way as to alarm passengers.[27]

Careless driving, on the other hand, is exemplified by:

- overtaking on the inside;
- driving inappropriately close to another vehicle;
- inadvertently driving through a red light;
- emerging from a side road into the path of another vehicle;
- tuning a car radio; when the driver was avoidably distracted by this action;

27 Crown Prosecution Service 2013.

- using a hand-held mobile phone or other hand-held electronic equipment when the driver was avoidably distracted by that use (note that this is an offence itself under Regulation 110 of the Road Vehicles (Construction and Use) (Amendment) (No.4) Regulations 2003). If this is the only relevant aspect of the case it is more appropriate to use the specific offence;
- selecting and lighting a cigarette or similar where the driver was avoidably distracted by that use.[28]

As can be seen, driving through a red light is only deemed to be careless if this was 'inadvertent'; where it appears to be deliberate it would fall within the scope of dangerous driving. Further consideration ought to be given to possible defences in such cases, however. Where D drives through a red light as the result of a heart attack or some other medical episode which can be evidenced, D is unlikely to be charged with either offence, since a defence of automatism or insanity is likely to apply.[29] It should be noted that prosecutors must use their common sense in applying the law and resolving a case which does not fall within the examples provided by the guidance. If D claims not to have seen the traffic signal or sign requiring D to stop or give way, the question to be addressed is whether a competent and careful driver would have seen the sign or signal and had a chance to conform to the requirement.

Actions such as using a mobile phone or lighting a cigarette are careless if that leads to the driver becoming 'avoidably distracted', but if it is such that D becomes 'avoidably *and dangerously* distracted' it can amount to dangerous driving. Interviews with Crown prosecutors, however, confirm that where a fatal collision has occurred and there is evidence that D was using his or her mobile phone at the time, then a charge of CDDD, rather than CDCD, will likely be preferred.[30] Clearly, if a fatal collision has occurred, then D was both avoidably and dangerously distracted by such use (unless there is some additional cause of the collision outside the control of D). This might be one example of where the distinction between careless driving and dangerous driving does not depend solely on how far below the standard of the competent and careful driver D falls, but on whether in doing so D created a risk of injury to others. Where a fatal collision has resulted, that in itself will provide evidence of such a danger (as compared to a case where D is found to be driving whilst using a mobile phone but luckily there is no collision).

The sentencing guidelines for CDCD split the offence into three levels of seriousness, with the top level almost overlapping with the bottom level of CDDD and covering driving "falling not short of dangerous driving", where D can expect a custodial sentence of around fifteen months. Disqualification from driving is mandatory, unless the court finds special reasons not to do so, whatever the level

28 Crown Prosecution Service 2013.

29 Full discussion on the applicability of such defences is outside the scope of this chapter. Whether D is guilty of an offence may depend on whether D is at fault for getting behind the wheel of a vehicle despite feeling unwell. For a discussion, *see* Cunningham 2008, Chapter 2.

30 These interviews formed part of a project funded by the Arts and Humanities Research Council. A report detailing the main findings of the project can be downloaded from: <www2.le.ac.uk/departments/law/people/sally-cunningham>.

of offence. At the bottom end of the spectrum, however, are cases arising out of momentary inattention, where a community order will be passed and D should escape a custodial sentence.

From this it can be seen that E&W has taken the step to criminalise to a serious degree those who commit an error behind the wheel, albeit that the sentence actually passed is likely to reflect the low level of culpability of D. From an empirical study conducted by the author, it would appear that some of the most prevalent cases of CDCD appear to be the 'looked but did not see' right of way violation cases: those where D, driving a car, pulls out into the path of a motorcycle.[31] Clearly all drivers have an obligation to make sure the road is clear of all traffic before conducting such a manoeuvre, but it is these cases that tend to be placed within the bottom level in terms of sentencing and classified as 'momentary inattention'. Typical of such a case was one where D attempted to turn right from a main road into a side road (it should be noted that unlike most European countries, E&W employs a system in which vehicles are driven on the left-hand side of the road). He had thought he had sufficient time to make the manoeuvre as the only vehicle he saw coming in the opposite direction, a car, was some way away. However, V, riding a motorbike at a speed of between 33-38 mph in a 30 mph zone, overtook that car and collided with the rear of D's car. D pleaded not guilty to CDCD but was convicted by a jury and sentenced to 180 hours unpaid work and a two-year disqualification.

Often in such cases the deceased bears some responsibility for the collision, and the question becomes whether D has in fact fallen below the standard of the competent and careful driver. In cases where the evidence is that V would have been visible at the time D pulled out, this is likely to be instrumental in influencing a decision to charge CDCD. In cases where the evidence is equivocal, and it is suggested that due to V's excess speed V may not have been visible at the time D made his or her decision to pull out, the CPS is more likely not to prosecute. In such cases the CPS lawyer must assess whether there is sufficient evidence to prove that D drove below the standard of a competent and careful driver; if it cannot be proved that V was visible to D when D pulled out then it may be decided that there is not a realistic prospect of conviction, since D may not have driven below the standard of a competent and careful driver.

Where V is speeding but would still have been available to be seen by D, the CPS will be minded to bring charges but that does not necessarily mean that a conviction will ensue. Of twenty-two cases of CDCD in the research sample of the author's project only one resulted in an acquittal; a case in which D pulled out from a T-junction into V's motorcycle's path. The evidence of the police collision investigator was that V was travelling at 42 mph in a 30 mph limit but that he would have been available to be seen by D when D commenced his manoeuvre, although D's defence at trial was that had V's speed been at the top of the range of speed estimated V would not in fact have been in view. The jury (D elected to be tried in the Crown Court) found the 80-year-old defendant not guilty.

31 *See* Kyd Cunningham 2013.

Many cases of CDCD result in guilty pleas being entered, however, meaning that D will not face a trial either in front of magistrates or a jury. A typical case of CDCD observed by the author was one in which D was waiting at a junction to turn right onto a main road. V was riding his motorbike along the main road, approaching from D's right, having recently emerged from the entrance to a pub 65 metres along the road from D. A witness (W) was waiting to turn right from the main road into the road in which D was waiting, across the lane in which V was approaching from the opposite direction. W made that turn just before D made the decision to pull out. D pulled out into the path of V, causing V to lose control of his motorbike and collide with D's car. The Crown suggested that D failed to see V because her view was blocked by W's car, and the fact that W made the turn led her to believe that it was safe for her to pull out, without ensuring for herself that such was the case. W had cleared the junction by the time D pulled out, and W said that D should have waited for V to pass and had pulled out too early. D claimed that she did not see V or his motorbike at any time prior to the collision, and the Crown accepted that she had suffered a momentary lapse of concentration.

D was arrested at the scene for causing death by dangerous driving. She said she looked right, looked left and pulled out, and that her mistake was that she did not look right again. The road on which the collision occurred had a 60 mph speed limit, and the speed of V's bike at impact was calculated to be 20 mph, having accelerated up to 21-34 mph when he left the pub. V's blood alcohol concentration was found to be over twice the legal limit, but this was not seen to be contributory to the collision. D was charged not with CDDD but with CDCD and initially pleaded not guilty, but changed her plea when a report provided by a defence expert agreed with that of the police collision investigator that V would have been visible to D and there was no explanation for her failing to see him.

The Crown accepted that the case fell into the bottom category under the sentencing guidelines, with no additional aggravating features. In sentencing, the judge stated that no words were adequate to reflect the suffering of V's widow, and he hoped that she understood the reason why the Court would not be imposing a prison sentence. A sentence could never reflect her loss in any case, he noted. He acknowledged that the family had been unable to complete their grief whilst the court case was outstanding. He went on to state that D was of exemplary character and was driving in a sensible manner prior to the scene of the crash. Her crime was to turn into the path of V in a moment of inattention; it was an error of judgement that had cost a man his life. The judge found that D's view was partially obstructed by a car turning (that of W), but stated that D should have taken more care. D was sentenced to a medium community sentence of a twelve-month community order with a twelve-month supervision requirement, and was also disqualified for two years. This case is presented as one typical of cases of CDCD and was not one in which the sentence was seen to be controversial. It should be noted, however, that the Court of Appeal has had to deal with a number of appeals against sentence since the offence first came into force.[32]

32 Including: *Campbell* [2009] EWCA Crim 2459; *Larke* [2009] R.T.R. 33; *Yates* [2009] EWCA Crim 2328; *Rice* [2009] EWCA Crim 1967; *Laws* [2009] EWCA Crim 2767; *R v W, Gregson, Edge, Crooks*

The possibility of creating a new offence of CDCD was first considered in 1988 at the time when a review of the law was being conducted which eventually led to the Road Traffic Act 1991 being passed, replacing reckless driving with dangerous driving and creating the new offence of causing death by careless driving whilst under the influence of drink or drugs (discussed below).[33] At that time there was some support for an offence of CDCD without the aggravating factor of drink-driving, but the majority who opposed it thought it was wrong in principle to look to the consequences rather than the culpability of careless driving, and that although a crime such as CDDD could be based on the consequences of driving, culpability was not high enough in careless driving to do the same. Carelessness might amount to no more than a minor error of judgement or a moment's inattention, and the existence of an offence of CDCD was unlikely to act as a deterrent.

Two decades later, however, despite these arguments being no less germane, the offence of CDCD was introduced. By 2005 the Government felt that public pressure to deal more severely with drivers who kill had reached such levels that it could justify a new homicide offence. As the courts had taken the consequences of dangerous driving into account to allow multiple deaths to provide aggravating factors in sentencing for CDDD,[34] it felt that consequences should also be relevant to D's culpability in cases of careless driving.[35] Interestingly, the proposed offence was opposed by the legal profession, with the exception of the CPS,[36] although during the author's recent project, involving interviews with Crown prosecutors, some CPS lawyers also expressed a degree of opposition to it. The advantage of the offence for prosecutors is that it closes the gap between the two bad driving offences when a death results. Prior to the Road Safety Act 2006, prosecutors struggled to explain to bereaved families in cases of careless driving involving a fatality that not only would their relative's death not be mentioned in the charge, but that the most the driver would face if convicted was a fine and penalty points. Many families were unhappy with this and felt let down by the justice system. Now they have an offence which recognises the death in the label and gives the possibility of a prison sentence. However, it is only a *possibility* and, in many cases (those amounting to momentary inattention and falling within the bottom level for sentencing purposes), the penalty will be no more than a community sentence. The result is that families may still feel that justice has not been done. That said, prosecutors find that families are more satisfied with the fact that the case is being dealt with in the Crown Court rather than the magistrates' court, feeling that their case 'matters' more and is being treated seriously.[37]

[2009] EWCA Crim 2299; *Palmer* [2010] EWCA Crim 1863; *Marjoram* [2010] EWCA Crim 1600; *Henry* [2011] EWCA Crim 630; *Pitcher* [2011] EWCA Crim 453; *Geale* [2012] EWCA Crim 2663; *Bagshawe* [2013] EWCA Crim 127.

33 Department of Transport & Home Office 1988.

34 *Cooksley* [2004] 1 Cr App R (S) 1.

35 Home Office 2005a.

36 Home Office 2005b.

37 *See* report, above note 30.

3.3.3 Causing Death by Careless Driving Whilst under the Influence of Drink or Drugs (CDCDUI)

Although CDCD under Section 2B of the Road Traffic Act 1988 is a fairly new offence, there was in existence already an offence of causing death by careless driving, but only one in which carelessness must be combined with drink-driving to cause a fatal collision. The offence of CDCDUI was introduced by the Road Traffic Act 1991, inserting Section 3A into the Road Traffic Act 1988. Section 3A provides:

> 3A(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention or without reasonable consideration for other persons using the road or place and –
> (a) he is, at the time when he is driving, unfit to drive through drink or drugs, or
> (b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at the time exceeds the prescribed limit, or
> (c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable cause fails to provide it,
> (d) he is required by a constable to give his permission for a laboratory test of a specimen of blood taken from him under section 7A of this Act, but without reasonable excuse fails to do so,
> he is guilty of an offence.

Both the elements of drink-(or drug-)driving and careless driving must be proved. If D's driving fell below the standard of a competent and careful driver and D was either unfit through drink or drugs, found to be over the legal BAC limit or D failed to provide a specimen, CDCDUI can be charged. There is no need to prove that it was the drink or drugs that caused D to drive below the standard of the competent and careful driver, just that both elements of the offence are present. However, if the standard of D's driving is bad enough to amount to dangerous driving, a charge of CDDD should be brought instead of CDCDUI.[38]

That D was under the influence of drink will normally be proved through the second option above, involving a positive test for alcohol in the breath, blood or urine of D. The prescribed limit of alcohol is currently 35 micrograms of alcohol in 100 millilitres (35 µg/100 ml) of breath, 80 milligrams of alcohol in 100 millilitres (80 mg/100 ml) of blood, or 107 milligrams of alcohol in 100 millilitres (107 mg/100 ml) of urine.[39] This is unusually high, compared to the rest of Europe, and despite calls to lower the level to 50 mg/100 ml blood,[40] the government has remained resistant to further limits on the autonomy of drivers.

In relation to drug-driving, currently the offence can only really be proved under Section 3A(1)(a), in that there is evidence that D was 'unfit' through drugs. Change is on the way, however, after Section 56 of the Crime and Courts Act 2013 was passed. This provision follows a recent review of the law by Sir Peter North

38 Department of Transport 1988, para. 6.19; Crown Prosecution Service 2013.
39 Road Traffic Act 1988, Section 11.
40 North 2010. *See further* Cunningham 2011.

which considered whether a *per se* drug-driving offence similar to the BAC law ought to be introduced. North recommended that such an offence be introduced "as and when" research has established impairment levels for particular drugs.[41] Section 56 of the 2013 Act will insert a new Section 5A into the Road Traffic Act 1988 to create an offence of driving, attempting to drive or being in charge of a motor vehicle with a specified controlled drug in the blood or urine in excess of the specified limit for that drug. A regulation-making power is given to the secretary of state to specify which controlled drugs are covered by the offence, and the specified limit in relation to each drug. The recommended limits for sixteen different drugs have now been approved and will see eight generally prescription and eight illicit drugs added into new regulations that are expected to come into force in March 2015.[42]

The sentencing regime for CDCDUI is similar to that for CDDD: a maximum of fourteen years' imprisonment and mandatory disqualification for a minimum of two years.

3.3.4 Causing Death by Driving Whilst Uninsured, Unlicensed or Disqualified (CDUD)

It has never been accepted in E&W that drink-driving causing death, without the added culpability of carelessness, ought to be penalised more seriously than drink-driving itself. Unless D is drunk to the extent that his or her driving ability is adversely affected and D drives carelessly, if D is involved in a fatal collision with a BAC of more than 80 mg/100ml, D will be liable for the offence of drink-driving and not for the death. This is logical, in that had D been unable to avoid a collision even if sober (for example, it may be that the main cause of the collision emanated from V), then it would be wrong to attribute the death to D. However, such reasoning has not always been consistently applied to other forms of unlawful driving causing death. At the same time that the offence of CDCD was created, the government introduced a new constructive crime of causing death by driving whilst committing one of three underlying documentary offences. The Road Safety Act 2006 inserted Section 3ZB into the Road Traffic Act 1988, providing that:

> A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under –
> (a) section 87(1) of this Act (driving otherwise than in accordance with a licence),
> (b) section 103(1)(b) of this Act (driving while disqualified), or
> (c) section 143 of this Act (using motor vehicle while uninsured or unsecured against third party risks).

The offence, like CDCD, is triable either way, but can be seen to be less serious than CDCD in that it carries a maximum penalty of two years' imprisonment.

41 North 2010, para. 7.40.
42 Department for Transport 2014.

It must be proved that D was committing one of the three underlying offences when he or she was involved in a collision in which another person died. Whether anything more need be proved has been open to interpretation until very recently.

CDUD was the government's response to calls to do something about drivers involved in fatal collisions who should not have been behind the wheel of a car. An example was the case of Aaron Chisango, who was under the influence of drink and driving without insurance or a licence when his car collided with a young boy crossing the road. The media response to Chisango's sentence of two months' imprisonment for drink-driving[43] is an example of what was behind the government's motivation in introducing the law. The outcry was understandable to some extent (although it was no doubt aggravated by the fact that Chisango was reported to be an illegal immigrant), given the fact that Chisango had originally been charged with CDCDUI but the CPS chose to drop that charge on the basis that they were unsure they could prove that Chisango had driven without due care and attention due to "inconsistencies in witness statements", despite evidence that he was driving at 39 mph in a 30 mph limit.[44] Such media reports suggest that it was the decision of the CPS in such a case, rather than the law itself, which required examination and amendment. Nevertheless, the introduction of CDUD into the Road Safety Bill at the time this case was progressing was reported as being welcomed by the deceased's family.[45]

In suggesting the new offence, the government claimed that the culpability of drivers it would cover was clear:

> The mere act of taking a vehicle on to the road when disqualified is, in the Government's view, as negligent of the safety of others as is any example of driving below the standard expected of a competent driver, even if the disqualified driver, at a particular time, is driving at an acceptable standard.[46]

Unlicensed driving was deemed to demonstrate the same level of culpability. That a more stringent response should be made to those who drive illegally was supported by many, such as the police:

> all persons getting into a car knowing they are breaking the law before they turn on the ignition, should be dealt with in a manner that is robust and provides a visible deterrent to all other would be uninsured/disqualified drivers.[47]

This view was supported by police officers interviewed by the author once the offence had come into force, but what it ignores is that the underlying offences themselves are strict liability, meaning that there is no requirement for the Crown

43 *See* <www.thesun.co.uk/sol/homepage/news/67295/Killer-drink-driver-walked-free.html>.
44 *See* above note 43.
45 'This illegal immigrant was drunk, had no insurance and was speeding when he killed our son', *The Sun*, 16 October 2006.
46 Home Office 2005a, para. 4.2.
47 Home Office 2005b, p. 23.

to prove that the driver knew that he or she was breaking the law when they set out to drive. Of the three underlying offences, driving without insurance is clearly the one which is most likely to be committed inadvertently, since D might be unaware that D's insurance has failed to renew due to a technical difficulty such as a direct debit not being honoured by the bank. However, it is also increasingly possible that D may have been unknowingly driving whilst disqualified, thanks to an increased tendency of the courts to disqualify drivers in their absence under totting-up procedures.[48]

Whilst lawyers knowledgeable of the general principles of criminal law might balk at the creation of an offence which has been described as one which "lets rip a double-barrelled discharge of strict liability",[49] in that no *mens rea* is required either in relation to causing death, or in relation to the underlying offence, such objections were clearly not shared by Members of Parliament or members of the general public. Independent research to test public opinion on sentencing for causing death by driving offences found that participants considered CDUD to be more serious than CDCD and only marginally less serious than CDDD, and were astonished by the 'low' maximum penalty of two years' imprisonment.[50] Such a response was explained by the assumption that this offence includes "an inherent avoidance or disobedience of the law which is deemed highly culpable".[51] As previously noted, however, the fact that these offences involve strict liability means that this assumption is not necessarily correct.

When the offence was first introduced it created some confusion amongst prosecutors, defence lawyers and the courts as to what were its ingredients. Cases soon reached the Court of Appeal which, in the case of *Williams*,[52] ruled that no fault was required on D's part in relation to D's driving for the offence to be made out. That case was applied shortly afterwards in the case of *Hughes*.[53] In the course of the author's research into cases decided between 2008 and 2011 it was found that those who had no reason to know that they were driving without insurance were susceptible to prosecution under this offence if they were involved in a collision in which the driver of the other vehicle, who was at fault for the collision, was killed.

However, the position has recently changed with the Supreme Court providing its interpretation of the requirements of the offence in *Hughes*[54] in July 2013, on appeal from the Court of Appeal. This decision will be welcomed by many and will be discussed in more detail below. Suffice it to say at this point that the Supreme Court overruled the Court of Appeal's decision and established that the offence of CDUD requires *some* degree of fault in D's driving in relation to the causing of death. At this point in time it remains unclear as to exactly *what* is required in terms of fault, however. The Supreme Court was clear that fault would not have to be of the degree amounting to careless or inconsiderate driving:

48 *See* Corbett 2012.
49 Sullivan & Simester 2012, p. 753.
50 Sentencing Advisory Panel 2008, para. 145.
51 Sentencing Advisory Panel 2008, para. 145.
52 [2010] EWCA Crim 2552.
53 [2011] EWCA Crim 1508.
54 [2013] UKSC 56.

> Juries should thus be directed that it is not necessary for the Crown to prove careless or inconsiderate driving, but that there must be something open to proper criticism in the driving of the defendant, beyond the mere presence of the vehicle on the road [...].[55]

The example the Supreme Court gives is that of a driver who is exceeding the speed limit, but not by enough to make his driving careless, who collides with a drunk driver when he might have been able to stop and avoid a collision had he been driving within the speed limit.[56] Whilst it is to be welcomed that common sense has prevailed in rejecting the concept of a homicide offence based on 'double strict liability' by at least partially removing one aspect of strict liability, this leaves prosecutors with a difficult task on their hands in determining when they ought to bring charges under Section 3ZB, since the Supreme Court has left it to the courts to work out the circumstances in which the offence is committed "as factual scenarios present themselves".[57]

3.4 Serious Non-Fatal Driving Offences

Until 2012, any harm falling short of death caused by bad driving would be penalised through the application of the appropriate conduct crime in the form of a driving offence, whether that be dangerous driving (maximum sentence: 2 years' imprisonment), careless driving (maximum sentence: £5,000 and possible disqualification) or drink-driving (maximum penalty: 6 months' imprisonment for a first offence; mandatory disqualification). There also exists the offence of 'wanton and furious driving',[58] a result crime requiring that bodily harm be caused, in existence since before the time of motorised vehicles. However, that offence, carrying the same maximum penalty as dangerous driving (two years' imprisonment) has been very rarely charged in recent years, with the CPS policy suggesting that it should only be charged where dangerous driving is inapplicable due to the vehicle involved being non-motorised (a horse-drawn cart or bicycle, for example), or where the driving took place somewhere other than on a public road.[59]

3.4.1 Causing Serious Injury by Dangerous Driving (CSIDD)

In 2012 the Road Traffic Act 1988 was amended by Section 143 of the Legal Aid, Sentencing and Punishment of Offenders Act to insert a new Section 1A creating an offence of causing serious injury by dangerous driving:

55 At para. 33.
56 At para. 32.
57 At para. 33.
58 Offences against the Person Act 1861, Section 35.
59 Crown Prosecution Service 2013.

> *1A Causing serious injury by dangerous driving*
> (1) A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.
> (2) In this section 'serious injury' means –
> [...] physical harm which amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861.

The offence came into force on 3 December 2012 and is triable either way, carrying a maximum penalty of five years' imprisonment if tried at the Crown Court. This penalty allows the gap in maximum penalties between CDDD (fourteen years' imprisonment) and dangerous driving (two years' imprisonment) to be narrowed in cases where fortunately V survives a collision but unfortunately is left with serious injuries. It is too early to tell the extent to which the offence is likely to be used, although contact with police forces involved in the author's recent study on the causing death offences suggests that few cases are yet to be charged. Recent news stories suggest that it might, however, be used in one of two ways. Firstly, it is likely to be charged in cases where there has been a fatal collision and D is charged with CDDD, but where there are also victims of the collision who survived and suffered serious injuries.[60] Alternatively, it might be used in a case where D is suspected of using her car as a weapon of offence in causing serious injuries, but the Crown suspects that proving the necessary *mens rea* for a more serious non-fatal offence against the person might prove difficult.[61] CSIDD is constructed to mirror CDDD, with the only difference being that grievous bodily harm (defined as 'really serious harm' in case law),[62] rather than death, must be caused.[63]

3.5 Causation

The one common element of all of the offences in this chapter is that they require that the driving *caused* the prohibited harm, whether that be death or grievous bodily harm. Causation is, of course, a general principle of criminal law which pervades all result crimes, not just the ones under discussion here. However, it is in relation to the causing death by driving offences that the case law has struggled

60 This occurred in the case of Anton Maizen who drove a lorry whilst fatigued and ploughed into the rear of a queue of traffic on a motorway and was charged with one count of CDDD and two counts of CSIDD. He pleaded guilty to all charges: Press Association, 'Lorry driver jailed for fatal crash', *The Guardian*, 31 August 2013.

61 Navlet Anderson was charged with both causing grievous bodily harm with intent under the Offences against the Person Act 1868, Section 18, and with CSIDD, after she drove into the front of a kebab shop, injuring a number of pedestrians. The Crown alleged that she had intended to strike one of the victims, with whom she had earlier had an altercation, with her car. At trial she claimed that she did not intend to harm V but that her flip-flop had become caught between the accelerator pedal and the floor of the car. The jury acquitted her of the Section 18 charge but convicted her of CSIDD. She was sentenced to three years' imprisonment and disqualified for five years: BBC News, 21 August 2013, <www.bbc.co.uk/news/uk-england-bristol-23778671>.

62 *DPP v Smith* [1961] AC 290.

63 *See further* Cunningham 2012.

to establish the required degree of contribution to the death by D's act of driving. The main problem here, as opposed to other criminal offences, is that where two vehicles collide it may be that both drivers are, to different degrees, responsible for the collision. This was acknowledged by the trial judge in the leading case of *Hennigan*,[64] who directed the jury in accordance with existing authority on causation that D's driving must have been a substantial cause of the collision. In being asked by the jury for further direction on the meaning of 'substantial' the judge said:

> 'Substantial' means that it is not a remote cause of the death, but it is an appreciable cause of the death. It is rather like this: in a collision between two motor-cars there may be both drivers each 50 per cent to blame, and each would be a substantial cause of the collision. If on the other hand you get a situation where you can say that one of the drivers was four-fifths to blame and the other was one-fifth, you can say: 'I don't regard one-fifth as being a substantial cause of the accident; if it is as low as that, then the fellow who really caused the accident was the one who is four-fifths to blame.'[65]

The Court of Appeal dismissed D's appeal against conviction. In relation to the judge's direction, the Lord Chief Justice said:

> It is perhaps unfortunate that he dealt with the matter in the illustration he gave on the basis of apportioning blame, but when one analyses it, it is quite clear that the direction, if anything, was much too favourable to the appellant. The Court is quite satisfied that even if the appellant was only one-fifth to blame, he was a cause of the death of these two people.[66]

It was noted that there was nothing in the statute that required the driving to be a 'substantial' cause, with the Court stating that "so long as the dangerous driving is a cause and something more than *de minimis*, the statute operates".[67]

Hennigan has been the accepted authority for many years, but difficulties arose with its application once the new CDUD offence came into force. Here the Court of Appeal in *Williams* first interpreted the offence as requiring no blameworthiness on the part of the defendant in terms of bad driving, meaning that it might be that the deceased was entirely responsible for the collision and yet D could be prosecuted for causing his or her death. The Court suggested:

> it is difficult to conceive of any other intention of Parliament than that if a person drove unlicensed or uninsured, he would be liable for death that was caused by his driving however much the victim might be at fault; it was therefore sufficient that the cause was not negligible.[68]

64 (1971) 55 Cr App R 262.
65 At 264.
66 At 265.
67 At 264-265.
68 At 599.

The facts of *Williams* were that D had been driving his car on a dual-carriageway without a licence or insurance, as was a regular thing for him to do. A pedestrian stepped out from the central reservation directly into D's path and there was nothing D could do to avoid the collision. This was accepted by the Court, who also acknowledged that D had not been exceeding the speed limit and so was in no way at fault for the collision. Despite this, it was found that the death of the deceased could be attributed to D's driving in that the driving of his car on that road at that time was one of the factors which led to the death.

This was taken a step further by the Court of Appeal with the case of *Hughes*. In that case D had collided with V's oncoming car when the latter crossed onto D's side of the road. It was accepted that, in terms of civil law, V was 100 per cent to blame for the collision, having driven whilst under the influence of drugs and whilst fatigued; that D could not have avoided the collision and that D's driving was faultless. Nevertheless, D had been driving without insurance or a licence and so was prosecuted for CDUD. The trial judge, however, made a ruling that D could not be liable for CDUD on the facts of the case; a ruling against which the Crown appealed. The ruling was made before the judgment of *Williams*, and the judge made it on the basis that to say that D had 'caused' V's death would amount to a contortion of an ordinary word:

> The Oxford English Dictionary defines the transitive verb 'to cause' as 'to be the cause of; to effect, bring about, produce, induce, make.' In my judgment that requires some activity, not passivity, on the part of the person said to be doing the causing.[69]

The Court of Appeal found that *Williams* was binding and quashed the judge's ruling, ordering that the trial against D for CDUD resume.

What this suggested, as commented by Simester and Sullivan, is that CDUD was an offence which extended the ambit of English criminal law to include result crimes where any *sine qua non* connection between D's action (his illicit driving) and V's death would suffice as proof of causation.[70] As a result, it meant that even had V ploughed into D's vehicle whilst the latter was stationary in a queue of traffic or at a traffic light, D would have caused the death.[71] Such a suggestion caused consternation amongst English lawyers, as evidenced in the author's recent interviews with Crown prosecutors.[72]

However, as mentioned above, the Supreme Court has recently determined that the Court of Appeal's interpretation of Section 3ZB in *Williams* and *Hughes* was erroneous. In *Hughes* the Supreme Court sought to examine whether the language Parliament used in the statute was unambiguous and could be said to have such far-reaching effects. In what might be seen as a pragmatic approach to statutory interpretation it concluded that it had not. By using the word 'cause' the

69 Quoted in *Hughes* at para. 28.
70 Sullivan & Simester 2012.
71 Sullivan & Simester 2012.
72 *See* report, above note 30.

statute must be interpreted as requiring that causation be determined on the ordinary common law approach. The Court rejected the suggestion of the Crown that D could be said to have caused another's death whenever he is on the road at the wheel and a fatal incident involving his vehicle occurs. To say so would mean that D would be found to have caused the death of a V who intended to commit suicide by stepping out in front of his car, or to have caused the death of a V who drove at D's vehicle with murderous intent to kill one of the occupants. If Parliament had intended this to be the result then it would have used language other than "causes [...] death [...] by driving" to ensure that such was the case.

Instead the Court decided that causation would only be established for the purposes of the offence when D has done or omitted to do something in his control of his vehicle which is open to proper criticism and contributes in some more than minimal way to the death. It is not enough that D's driving was a 'but for' or *sine qua non* cause of death. To say otherwise, would be to suggest that planting a tree by the side of the road, into which a driver later crashes, would be to 'cause' the death of that person.[73]

It is too early to tell how the case of *Hughes* will influence the volume of CDUD cases going through the courts, but the obvious effect will be to reduce the number of prosecutions. Given that the number of cases is already fairly low (54 cases were brought in 2009-10 across E&W) it may be that the offence becomes rarely used, although it might still be of use in cases such as that of Aaron Chisango discussed above. It may well be that there will be cases in which victims are disappointed by the lack of a 'causing death' charge, but it is only right that the highest court of the land should reinstate a fundamental principle of criminal law in requiring legal 'causation' to be applied to a 'causing death' offence.

3.6 Police Investigations, the CPS and the Role of the Bereaved

The investigation of fatal collisions by the police has undergone considerable change in the past decade. While Parliament has identified the importance of recognising the impact that road death can have on individuals' lives through the introduction of new serious driving offences, as set out above, the police and CPS have also adapted their policies to the prevailing mood of citizens by demonstrating that they take road death seriously.

The police, through the Association of Chief Police Officers (ACPO), has done so with the introduction of the Road Death Investigation Manual (RDIM), first written in 2001 and updated in 2007. The RDIM aims to provide advice and examples of good practice for the professional investigation of road deaths,[74] and is based on the Murder Investigation Manual. It provides detailed information

73 *See Hughes* at para. 25.

74 NPIA & ACPO 2007. Note that since the College of Policing was set up, much of ACPO's work has been taken over by this new College, which appears to have replaced the RDIM with the Authorised Professional Practice on Investigating Road Deaths in 2013, available at: <www.app.college.police.uk/app-content/road-policing-2/investigating-road-deaths/>.

on how best to develop strategies on everything from crime scene management to family liaison. Key to the approach is the underlying message that these are serious cases with the potential to result in prosecution for a serious imprisonable offence.

Given the thoroughness of the RDIM, if it were to be followed to the letter in every single case, there is little doubt that bereaved families would feel secure in the knowledge that their case was being investigated to the highest standard. However, the status of the Manual is that it is advisory and it clearly states that the extent to which the procedures it recommends are adopted is a matter of discretion for each individual police force.[75] The result is that road death investigations are susceptible to substantial inconsistencies in quality and approach, depending upon the geographical location of the collision. Each force will implement the RDIM in different ways, with varying degrees of commitment, dependent in part upon the local police culture but largely on resources.

There is an increasing use of detective trained officers in the investigation of road death in some forces. The benefits of this initiative are seen to include greater training on interview technique that such officers receive. However, the best model is probably one which employs both traffic officers and detectives to work together in a centralised Collision Investigation Unit (CIU). The benefit of such an approach is that members of the CIU exhibit both the background knowledge of the technical side of traffic offences and the enhanced skills in investigation. Key to the successful prosecution of most cases is the evidence of the Forensic Collision Investigator, who uses marks on the road and calculations relating to speed and velocity on impact to reconstruct how a collision occurred.

Central to the experience of police investigations into their loved one's death for bereaved families will be the role of the Family Liaison Officer (FLO). A decade ago, when the RDIM was first introduced, it was rare for FLOs to be used in cases of road death, although they were common in other cases of unlawful killing. Now, however, FLOs are seen as a fundamental element of the police investigation, and are key to the provision of information to bereaved families about the progression of the investigation.

Once the police have completed their investigation, they will submit a file of evidence to the CPS for consideration as to whether any charges ought to be brought against any surviving driver. A report published by Her Majesty's Crown Prosecution Inspectorate (HMCPSI) in 2002,[76] recommended that specialist prosecutors ought to be trained to deal specifically with all road death cases. By 2008 "substantial progress" had been made on this recommendation,[77] and it is now common for each geographical area to employ a small team of specialists tasked with reviewing these cases. In addition to this, further quality assurance of charging decisions was implemented between 2008 and 2011 following the enactment of the Road Safety Act 2006, in that all charges had to be authorised by the Chief Crown Prosecutor of each area. It seems that this policy was implemented partly

75 At p. 10.
76 HMCPSI 2002.
77 HMCPSI 2002, p. 60. It was noted, however, that there is no national specialist training available.

in order for the CPS to monitor how the new causing death offences were being utilised in practice, demonstrating the impact that legislative change can have on working practices of the CPS.

Of particular interest is the evidence from the author's own recent research that the police and CPS work very much as a team on road death investigations. Investigations are characterised by close working relationships between investigating officers and specialist prosecutors, who communicate effectively in order to reach a conclusion as to the disposal of a case.

Despite the author's own positive findings indicating that in the CPS Areas where her recent research was conducted there is clear evidence of best practice being adopted, dissatisfaction with the criminal justice system's response to road death appears widespread. Media reports of specific cases in which bereaved families have complained about sentences passed are common, particularly at a local level, with occasional pleas to deal more seriously with drivers involved in fatal collisions.[78] Responses to ACPO's consultation regarding the RDIM also uncovered extreme dissatisfaction amongst bereaved families with regard to their experience of the criminal justice system. There are clearly some cases where mistakes are being made, as indicated by remarks made by the judge in some cases.[79] Surprisingly, despite the offence of CDCD having been created as a response to victim pressure groups calling for the gap in sentencing between careless driving and dangerous driving causing death to be closed, there have recently been calls from at least one victim group for the new offence's abolition.[80] This last proposal seems to have been made on the basis that victims' groups suspect that CDCD is being charged where CDDD would be the appropriate offence, leading to a downgrading of charges and lesser sentences. Although it is true that the official statistics show a drop in the number of convictions in CDDD since CDCD was introduced,[81] the author's own project found no evidence of downgrading,[82] suggesting that either downgrading is occurring outside the CPS Areas researched or that there are alternative explanations such as the reduction in the number of road traffic fatalities over the period.[83] The problem faced by the criminal justice system, including the CPS and courts, is that the culpability displayed by a careless driver who causes death may be low, albeit the consequences of such carelessness were disastrous. Although there are claims that drivers who kill face lower sentences than offenders guilty of killing by other means, it has to be accepted that to compare those

78 *See*, for example, Craig Woodhouse, '500 killer drivers cheat jail in 5 years', *The Sun*, 23 September 2012, available at: <www.thesun.co.uk/sol/homepage/news/4552401/.html>.

79 *See, e.g.*, the case of Jordan Clayton sentenced by Judge Stephen Everett for CDCD on a charge of CDDD: 'Judge criticises handling of bypass death trial', *The Bolton News*, 15 February 2012, available at: <www.theboltonnews.co.uk/news/9531736.print/>.

80 *See* <www.StopDangerousDrivers.com>, supported by Karen Lumley MP: 'MP gets tough on dangerous drivers who kill', *Redditch Advertiser* 2, November 2012, available at: <www.redditchadvertiser.co.uk/news/10018232.MP_gets_tough_on_dangerous_drivers_who_kill/>.

81 In 2007 there were 233 convictions for CDDD; this fell to 114 convictions in 2011: *Criminal Justice Statistics England and Wales 2011*, Table A4.4.

82 Kyd Cunningham 2013.

83 Road deaths fell to an all-time low of 1,754 in 2012, Department for Transport 2013.

guilty of CDCD or CDDD with convictions for manslaughter is not to compare like with like. For a bereaved relative, however, such arguments will be difficult to accept since the focus will be on the loss suffered.

In the past decade the police, CPS, courts and coroners have become far more attuned to the impact on the family that a road death and subsequent investigation have. This has been facilitated by the close working relationship between the police and CPS and by the Victim Focus Scheme (VFS). The VFS applies to cases of homicide, including CDDD and CDCD, both in the Crown Court[84] and more recently in the magistrates' court, the scheme having been extended in March 2010.[85] Under the VFS, a meeting will be offered by the CPS to a bereaved family once the decision to charge has been made, with the aim of informing the family of the processes involved in the case and what outcome they might expect. Further meetings should be offered at specific points in the process, including conviction and sentencing or acquittal. CPS lawyers interviewed by the author agree that meetings are very important to make families feel involved and that their views are taken on board and respected. Many prosecutors put themselves in the shoes of bereaved families, displaying a good deal of empathy.

Victims are also able to feel involved in the case against D by making a Victim Personal Statement (VPS), which is written in advance of any court case to be read by/to the judge in sentencing. Relatives will be informed that any VPS they make is unlikely to have an impact on sentencing, but that it is an opportunity for their views to be heard. One of the benefits of the new offence of CDCD is that many of these cases are dealt with at the Crown Court, with the effect that relatives feel that their case is being taken seriously, rather than being heard in the magistrates' court which is often seen as dealing with 'trivialities'. But whether or not a case is dealt with summarily or on indictment, what seems to matter most to many families is the defendant's willingness or otherwise to accept responsibility and recognise the harm he or she has done. The problem with the adversarial system in E&W, however, is that there is much to prevent such apology being forthcoming. A defendant is likely to be tempted to plead guilty at an early stage thanks to the discount in sentence that such a plea will bring, but the characteristics of road death investigations act as a deterrent to this. The fact that much turns on how forensic evidence from the scene of the collision is interpreted, and that defendants are unlikely to see such evidence or employ their own defence expert to test such evidence until close to the trial date, means that often the entry of guilty pleas is delayed.[86]

Although some families express a view that the sentence is less important to them than the acceptance of guilt, for many the fact that the new offence of CDCD provides for the possibility of a prison sentence where careless driving kills is seen as the main benefit of the new offence. In practice, however, it will often be the case that a driver will not face a prison sentence, since the application of the

84 Crown Prosecution Service 2007.

85 *See* <www.cps.gov.uk/legal/v_to_z/homicide_cases_-_guidance_on_cps_service_to_bereaved_families/>.

86 *See* Cammiss & Kyd Cunningham forthcoming.

sentencing guidelines precludes a prison sentence in those cases falling within the bottom of the three levels of seriousness.[87] The danger, then, is that bereaved families will have their hopes for a prison sentence dashed. This is where the VFS does an important job of managing expectations. Police FLOs and CPS lawyers are likely to go to some lengths to explain the sentencing regime to bereaved families in letters and at meetings prior to trial in order to ensure that the family understands how likely the imposition of a prison sentence is. As a result of the recent consultation on the RDIM, ACPO has expressed interest in introducing restorative justice initiatives into cases of fatal collisions. A further consultation is, at the time of writing, seeking responses from bereaved families to questions relating to the perceived appropriateness of introducing restorative justice programmes in the aftermath of a fatal collision.

3.7 Conclusion

The law of E&W relating to serious driving offences is amongst the most punitive in Europe and beyond. The past twenty-odd years has seen the creation of a number of serious result crimes being crafted out of existing endangerment offences, with the potential for more to be created in the future. For example, having recently introduced an offence of causing death by careless driving, and an offence of causing serious injury by dangerous driving, the next logical step might be seen to be the creation of an offence of causing serious injury by careless driving. It is in no way evident, however, that these offences are contributory factors in falling road casualty figures, or that they act to deter bad driving. Their primary role, it seems, is to provide the means for retribution in cases in which lives have been ruined by risk taking on the roads. Whether there are cultural reasons for victims of bad driving to call for ever-increasing penalties in comparison to their European counterparts is difficult to say, but it may be that the way in which the British media reports on such cases is at the heart of attitudes to the law in this area.

Whatever the reason, there appears to be no let-up in this punitive response to driving causing serious injury and death on the roads. In May 2014, the Ministry of Justice announced that it would be conducting a review of sentencing for such offences, and introducing new offences relating to disqualified driving. The Criminal Justice and Courts Bill seeks to create offences of causing death by disqualified driving and causing serious injury by disqualified driving, by inserting Sections 3ZC and 3ZD into the Road Traffic Act 1988. The causing death offence would be indictable only, carrying a maximum penalty of ten years' imprisonment, and would leave Section 3ZB to deal with just unlicensed and uninsured driving. The serious injury offence, on the other hand, would be triable either way, with a maximum penalty of four years' imprisonment in the Crown Court.

87 Sentencing Guidelines Council 2008.

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Chapter 4

French Criminal Law and Serious Traffic Offences: Aspects of Fault and Causation

Marie-Aimée Brajeux[*]

This chapter will focus on the law relating to serious driving offences in the French criminal justice system, and aims to present some of the wider issues raised by the development of this area of the law. The first part will present some relevant background information regarding the political and legal approach to driving offences and road safety in general. The second part will then look in more detail at the law which targets serious driving offences. Those offences are based on the general offences for involuntary homicide and involuntarily causing injury and rely on similar conceptions of fault, effectively creating aggravated driving-specific offences. In the context of those driving-related offences, the combination of the concepts of causation and fault has created a very severe regime of liability, tempered only by sentencing practices in the French criminal justice system.

4.1 Introduction: Relevant Background

This section will provide some background information about the French legal and criminal justice system, focusing on characteristics which are specifically relevant to the criminalisation of driving offences in general and serious driving offences in particular.

4.1.1 General Background: Civil Law and Codification

The codification of French law in the modern era has led to a diversification of the sources of law. Substantive law is contained in a number of codes, relating to the different areas of application of the law, ranging from tax law to contract and family law, but also social security, employment, etc.[1] In relation to the criminal law, this diversification of sources is also present, and leads to a distinction between what is called the 'droit pénal général' and the 'droit pénal spécial'. The

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1 *E.g.* Code Civil, Code de l'Action Sociale et de la Famille, Code de la Sécurité Sociale, Code du Travail, Code Général des Impôts, etc. All codes are available at <www.legifrance.gouv.fr>, and an official translation is available for some of them.

former establishes general principles of liability and sanctions, while the special part of the law applies those principles in the context of specific offences. Most of these principles, both general and special, are contained in the Code Pénal, which is regularly amended by legislation, and is the principal source of law known to the courts. The most recent overhaul of the criminal legislation dates back to 1994, since which date the Code is generally referred to as the 'Nouveau' Code Pénal.[2] In addition to this Code Pénal, other codes exist, compiling and codifying legislation which relates to particular areas of law and which include provisions which will be relevant to the criminal law. For example, the Code de la Santé deals with medical law, while the Code de la Route deals with traffic law, both areas which are concerned to some extent with criminal matters. In each code, there are provisions which outline criminal offences and sanctions, or specify the application of general criminal law principles to the specific area of law in question.

In terms of the criminalisation of traffic offences, the law can be found in both the Code Pénal and the Code de la Route. The Code Pénal presents general principles of liability and deals with the most serious offences such as murder and voluntarily causing injury, but also involuntary homicide and involuntarily causing injury, which can be committed while driving. As will be discussed later in this chapter, since 2003 the Code Pénal also contains specific offences for causing death or injury while driving, which are closely related to the general offences. There are, however, many other driving offences contained in the Code de la Route rather than the Code Pénal. This characteristic is important to understand the overall background of the French approach to criminalising driving offences, and also because of the confusion and overlap it sometimes creates. This situation will be discussed later on in this section, after a presentation of the general approach to driving offences in French criminal policy.

4.1.2 Driving-Related Offences: The Legislative Background

The stated aim of the French government in recent years has been to take a proactive stance on road safety to tackle the high number of deaths on the road and improve road safety in general. In 2002, an executive committee on road safety issued a report promising a major overhaul of the criminalisation of driving offences.[3] It was divided into two parts: the first one focusing on increased checks and sanctions to "change behaviour and ensure respect of the law", and the second focusing on efforts to create a culture of road safety in all stakeholders.[4] The report led to a law barely six months later, which was passed with little contest by Parliament[5] and which contained a wide range of measures, mixing the creation of new offences and the introduction of regulatory measures with the amendments of

2 For details of the reform which led to the creation of a 'new' Code Pénal, *see* Pradel 2012, paragraphs 123-126.

3 Rapport du comité interministériel de sécurité routière, 18 December 2002.

4 Rapport du comité interministériel de sécurité routière, 18 December 2002, parts I and II.

5 Act no. 2003-495, 12 June 2003.

existing provisions.[6] A detailed analysis of this reform would require more space than this work allows, but an overview of its approach to road safety reveals a three-pronged approach based on sensitisation, prevention and repression.

4.1.2.1 Sensitisation

The aim of sensitisation in French policy has principally been achieved through the use of multiple communication campaigns relating to the risks of driving-related accidents and deaths. A specific government department is dedicated to improving 'road security' and has produced, over the last decades, numerous shocking and often gruesome ads.[7] These cover a range of topics, including general driving advice, but also the risks of alcohol, tiredness and, more recently, the risk of using your mobile phone while driving. In more recent years, communication campaigns have focused particularly on the need for what can be referred to as 'safety accessories', such as the reflective vest, a signalisation triangle to use in case of a breakdown, and now alcohol-testing devices, which are all compulsory in any vehicle.[8] One recent campaign enrolled the help of Karl Lagerfeld, the head designer of the fashion house Chanel, to advertise the need for the use of the reflective jacket.[9]

4.1.2.2 Prevention

Prevention also plays a major role in the French government's approach to driving offences. The preventive rationale appears clearly in the enforcement of speeding-related offences and in particular the use of video cameras, which are very widely used in France,[10] but also in the criminalisation of practices such as tampering with a motorcycle in order to increase its speed, known as 'débridage'. While the Code de la Route criminalises the fabrication, import, commercialisation or distribution of items destined for this purpose in a relatively severe way,[11] the fact that the use of such items is not itself criminalised highlights the legislator's intention to prevent rather than purely repress.

The preventative aim of the policy is also closely related to the sensitisation objective, in particular in relation to the use of safety accessories. The commu-

6 For a detailed discussion of the measures included in this reform, *see* Céré 2003.

7 One striking ad from about 15 years ago included a young driver and his friends jumping a red light at an empty junction, the driver looking in relief in his mirror after he passed the junction only to see the passengers gravely injured in the back seat. For more examples of the adverts, *see* the website <www.securite-routiere.gouv.fr>.

8 *See* below, Section 4.1.2.2.

9 In a range of television spots and posters, he is photographed in his trademark black and white outfit wearing a reflective yellow vest, with the caption "it's yellow, it's ugly, it doesn't go with anything but it could save your life." *See* <www.securite-routiere.gouv.fr>.

10 Since 2004, automatic speed cameras can be used to target speeding drivers. *See* the Executive Order of 13 October 2004, 'Portant création du système de contrôle automatisé'. More recently, a new speed camera system has been approved for use on French highways, calculating the average speed of a car between two set cameras, rather than 'flash-cameras' which make measurements in one position.

11 *See* Article L317-5. The sentence for the offence is relatively serious, at 2 years' imprisonment and a 30,000 euro fine.

nication campaigns about the need for such accessories have been accompanied by a multiplication of the offences relating to road safety, often referred to as 'endangerment offences'. The use and possession of certain key 'safety accessories' have been made compulsory, in the explicit hope of preventing accidents and pre-empting risky behaviour.

For example, it is now compulsory to have an alcohol-testing device in one's car at all times,[12] as well as a fluorescent safety jacket and a signalisation triangle to use in case of a breakdown.[13] While the jacket and triangle are perhaps less pressing concerns in terms of the prevention of serious accidents, the obligation of carrying an alcohol-testing device represents a clear response to the high proportion of driving-related offences which are committed while drunk.[14]

This concern for prevention when developing driving offences can also be seen in the specific criminalisation of drug use while driving. The law has recently been amended to criminalise the act of driving while having used illicit substances, as opposed to driving under their influence (which is still the test in relation to alcohol).[15] The aim of this particular choice of syntax was to ensure that all drug usage would be caught as a criminal offence, irrespective of the defendant's state and level of cognitive impairment.[16] Prevention is also illustrated in the criminalisation of phone use while driving. Using a phone "held in the hand" is an offence in itself, irrespective of the consequences of it, leading to a fine and an automatic loss of two licence points.[17] This preventive provision has even been extended by the Cour de Cassation[18] in a judgment which held that the defendant did not have to be talking on the phone for the offence to be committed. In this particular case, the act of checking texts "using only the thumb" was found to fulfil the conditions of the offence.[19]

12 Décret no. 2012-284, 28 February 2012, in application from 1 March 2012. The décret was amended by executive order on 28 February 2013, preserving the obligation but abolishing the relatively modest sanction of an 11 euro fine; no sanction remains.

13 Décret no. 2008-754, 30 July 2008.

14 According to the most recent statistics on road safety, alcohol is a factor in about 30% of driving accidents resulting in death, and has been for over 20 years. The incidence of alcohol abuse in cases of injury is generally lower, 15.3% of cases leading to serious injury and only 9% leading to mild injury. *See* Bilan de l'accidentalité de l'année 2012 en France, Observatoire National Interministériel de la Sécurité Routière, available at <www.securité-routiere.gouv.fr>.

15 Article L235-1 of the Code de la Route criminalises driving while "having used" drugs, whereas the criminalisation of drunk driving is dealt with in Article L234-1, which makes an offence of driving "under the influence" of alcohol, with specific measurements as evidence of liability. Author's translation.

16 The law was voted in May 2011 and amended Article 235-1 of the Code Pénal, although the Cour de Cassation has since restricted the definition of the offence by holding that 'drug use' could only be proved by blood tests and that even the admission of the defendant would not be sufficient to establish liability.

17 Article R 412-6-1 Code de La Route. The first line explicitly refers to hand-held devices: "L'usage d'un téléphone tenu en main par le conducteur d'un véhicule en circulation est interdit."

18 The Cour de Cassation is the supreme court in the French criminal and civil legal system.

19 Cour de Cassation, 13 September 2011, Bull. Crim. 2011, no. 175.

4.1.2.3 Repression

Perhaps the most pervasive influence of the 2003 reform on the agenda relating to road safety, in addition to sensitisation and prevention, is the aim of repression.[20] Beyond the straightforward introduction of a wide range of more or less serious offences related to driving a vehicle, including preventative offences as seen above, this concern for repression has three key aspects. First of all, a wide range of legislative and regulatory measures aim to achieve a more streamlined enforcement of the offences related to driving. For example, a recent law has introduced the possibility for a defendant to plead guilty in the early stages of an investigation relating to a driving offence.[21] Although the process of a guilty plea is now available throughout the French criminal justice system, it is a lengthier procedure compared to this principle, which allows a driver faced with a fine to opt for the immediate (within 45 days) payment of a lesser fine, without challenging the accusation in court. This process was agreed in principle by the European Court of Human Rights,[22] conditional to an appropriate appeal procedure. Other examples of streamlined enforcement can be seen in the existence of a presumption of liability which applies to the registered owner of a vehicle involved in an accident. In principle, liability for any traffic incident is attached to the person driving the vehicle,[23] but Article L121-3 states that there is a presumption of liability of the registered owner of the vehicle for any financial consequences flowing from the commission of an offence. Although the drafting of the article suggests an intention to limit the presumed liability solely to aspects of the financial liability,[24] commentators have suggested that, by using the words 'responsabilité pénale' – meaning criminal responsibility – the article effectively creates a presumption of full liability. Whatever the extent of the presumption,[25] it is very difficult to displace: the registered owner must provide proof of the vehicle's theft or destruction, or give the identity and address of the actual driver of the vehicle at the time of the accident. Secondly, the objective of repression has been put forward by imposing severe sentences for offences committed while driving. As will be seen in the following section, the criminalisation of serious driving offences is based on the aggravation of related 'general' offences. The sheer fact that an offence is committed while driving a vehicle will generally lead to a heavier sentence.[26] Legislative policy has also imposed hefty penalties in relation to specific driving-related offences, and these sentences are sometimes increased by further legislation, for example in relation to the criminal offence of fleeing the scene of an accident, where a 2011 law increased the penalty from 2 to 3 years' imprisonment and from

20 For a fuller account of the 'repressive turn' taken by the 2003 reform, *see* Céré 2003.

21 Article 529-10 Code de Procédure Pénale.

22 European Court of Human Rights, 28 September 1998, *Malige v France*, 27812/95, paragraph 50.

23 Article L121-1 Code de la Route.

24 Paragraph 2 in particular lists the 'effects' that will not be attached to the payment of a fine under the presumption, such as an inscription to the defendant's criminal record.

25 *See* Section 4.1.3 for a discussion of the extent of this presumption.

26 *See* Section 4.2.1.

a 30,000 to a 75,000 euro fine.[27] Within driving-related offences, the sanctions available can also be increased depending on certain aggravating circumstances, such as the use of alcohol or the lack of driving licence.[28] Finally, the third aspect of the repressive objective of legislative policy in relation to road safety concerns the use of complementary sanctions. In certain cases, generally involving death or serious injury caused by driving, complementary sanctions can be imposed in addition to the sentence for the offence itself.[29] Two articles of the Code Pénal[30] introduce those complementary sentences, which are specifically related to driving and comprise a number of options:

- interdiction of driving any vehicle, even if it does not require a licence, for up to five years (or ten in the presence of one or more aggravating circumstances);
- cancellation of the defendant's driving licence and prohibition from requesting one for five years;
- obligation to undertake a road safety sensitisation course, paid for by the defendant;
- immobilisation of the vehicle used in the commission of the offence for a maximum of one year (only if the defendant is the owner);
- confiscation of the vehicle in the same conditions.

Other complementary administrative sanctions such as fines and the withdrawal of points on the driving licence are also available on an automatic basis.[31] This is generally dealt with by administrative courts.[32]

The three characteristics of sensitisation, prevention and repression in French legislative policy regarding road safety show how a relatively nuanced approach is taken in relation to the criminalisation of driving, lacing pure repression with objectives of prevention and sensitisation. This approach seems to have produced some positive results in relation to the number of traffic accidents and driving-related deaths over the last decades.[33] However, the proliferation of legislative provisions to tackle driving offences also seems to have created an 'over-abundance' of measures which can lead to confusion and overlap in the French criminal law, a situation which is potentially crystallised and aggravated by the codification regime.

27 Article L231-1 Code de la Route, reproducing Article 434-10 Code Pénal. Both were amended by Act no. 2011-267, 14 March 2011.

28 *See* Section 4.2.1.

29 The sentence for the offence itself will generally be a custodial one, albeit often suspended.

30 Articles 221-8 and 222-44 Code Pénal.

31 The use of 'automatic' sanctions was approved in European Court of Human Rights, 28 September 1998, *Malige v France*, 27812/95.

32 *See* Articles L223-1 to L223-8 and R223-1 to R223-13 of the Code de la Route.

33 According to the most recent report detailing 40 years of road safety interventions, the number of deaths per year has dropped from over 18,000 in 1972 to around 3,500 in 2012. *See* Bilan de l'accidentalité de l'année 2012 en France, Observatoire National Interministériel de la Sécurité Routière, available at <www.securité-routiere.gouv.fr>.

4.1.3 Towards Legislative Overkill?

The existence of different legislative sources stemming from the nature of the French legal system can in itself sometimes lead to confusion,[34] a tendency which has arguably been exacerbated by the multi-pronged approach to policy in relation to driving-related offences. Not only has there been a proliferation of offences to sensitise, prevent and repress traffic incidents, but these offences are not all contained in the same code. As a result, certain concepts are defined in both codes, with no clear indication as to which should prevail, and there are numerous cross references, which are not always updated following legislative reforms to the parallel provisions. One example of such confusion can be seen in the recent measures regarding the use and possession of alcohol testing devices in vehicles. A law was passed in February 2012, creating an obligation for all cars to have, at all times, a working alcohol-measuring device.[35] Although this provision was set to come into effect on 1 July 2012, the application of the article outlining the sanction for failing to meet the obligation, contained in Article R233-1, was delayed until November 2012. Beyond these chronological glitches, the drafting of the provisions can also lead to confusion: as a commentator pointed out, the obligation in practice calls for each car to hold not one but two testing devices. If a security-conscious driver uses a test one evening before going home, as it is encouraged he should do, and then proceeds to drive off in all legality with regard to the rules regarding alcohol consumption, he would however be in breach of Article R234-7, as the testing device would not be in working order anymore. Although the principal aim of this particular measure is sensitisation and is unlikely to lead to mass criminalisation,[36] this somewhat blithe example points out a more pressing concern regarding the way road safety legislation has evolved, in an inconsistent manner, sometimes too reactively and with no clear strategic roadmap in terms of criminalisation.

The recent development of driving-related offences also raises some important issues relating to procedural confusion. The proliferation of offences and sanctions made available to the courts, as well as the introduction of measures streamlining enforcement can lead to confusion between the different levels of enforcement, procedure and indeed the grounds for liability, as shown by the rules surrounding the creation of a presumptive liability for driving offences. The overarching rule is contained in Article L121-1 of the Code de la Route, which states that: "the driver of a vehicle is criminally responsible for all offences committed by him while driving said vehicle."[37] This article explicitly, and somewhat redundantly, attaches liability to the driver rather than the owner of the vehicle but does not establish a presumption of liability per se in relation to the elements of the given

34 Even after the reform leading to a 'new' penal code in 1994, reforms have taken place at an arguably alarming rate, one leading commentator labelling it a "perpetual movement". *See* Pradel 2012, paragraph 126.

35 Article R234-7 Code de la Route.

36 This was confirmed by the recent executive order which abolished all sanctions for failure to possess a working alcohol-measuring device. *See* note 12.

37 "Le conducteur d'un véhicule est responsable pénalement des infractions commises par lui dans la conduite dudit véhicule".

offence. The significance of this provision is better understood in relation to the second paragraph of Article L121-1 and Articles L121-2 and L121-3, which all provide exceptions to this rule. These exceptions apply to the financial sanction attached to specific offences or situations,[38] and aim to attach 'pecuniary' liability in those cases to the registered owner of the vehicle rather than the driver. The overall objective here is therefore clearly one of streamlined enforcement, enabling a simpler procedure: if the driver is not the owner of the vehicle, proving his identity could be more difficult and subject to a number of legal claims. It also aims to provide an easier access to the pecuniary dividends resulting from these offences, as the presumption applies to the registered owner of the vehicle, who by the very fact of his registration, will be easier to track down.

The exception in Article L121-2 concerns parking infractions and the payment of road tolls, a provision which is easily reconcilable with the objective of Article L121-1: when the infraction is minor and results only in the payment of a fine, with little to no subjective criminal responsibility, it makes more practical sense to attach the presumption to the registered owner of the vehicle in order to ensure payment of the fines. In the case of Article L121-3 however, the exception is potentially more problematic. The latter concerns minor offences (*infractions*) which, while they are not necessarily serious and result principally in the imposition of a fine, do engage the criminal responsibility of the defendant, for example in relation to speeding, the observance of safety distances and road usage in general.[39] The liability which is presumed with respect to the registered owner is deemed pecuniary and is meant to relate solely to the financial consequences of the conviction of such an offence, as specified in the second paragraph of Article L121-3, which states that this type of liability cannot lead to a registered status as a criminal, nor can it be taken into account in relation to rules regarding reoffending.[40]

The amendment to the provision aims to strike a balance between the need for streamlined enforcement with regard to fines and that of fairness and the appropriate allocation of criminal responsibility. Despite the terminological finesse attempting to draw a line between pecuniary and regular criminal liability, it is evident that the owner of the vehicle is in fact criminally liable, albeit not for all the penal consequences of the accident. This has been recognised in particular by a leading French commentator who affirmed when commenting on these measures, that the individual in question "is definitively criminally responsible, but his responsibility does not match its core consequences."[41] However, and despite the legislator's attempts to separate the financial criminal liability from wider-ranging consequences, the article does lead to a presumption of liability for the registered owner in relation to the criminal offence in question, fine or no fine. This presumption is particularly strong: according to the Cour de Cassation, it cannot be

38 Articles L121-2 and L121-3 refer to specific offences, while paragraph 2 of Article L121-1 creates a possible exception where the driver is contracted by another.

39 Article L121-3 Code de la Route.

40 Article L121-3 Code de la Route.

41 Mayaud 1999, p. 591.

displaced simply by stating that somebody else was in charge of the vehicle,[42] and can only be displaced by an official declaration of theft or destruction of the vehicle, or the identification by name and address of the person who was in fact driving the car.[43]

Beyond the stated aims of legislative policy, the reality of law-making in relation to driving offences in French criminal law is therefore slightly more complex than the government's strong policy would suggest. The multiplication of measures and different regimes has led to a complexification of driving-related offences and the sanctions attached to them. While the use of different texts such as the Code Pénal and the Code de la Route is a constant feature in French criminal law, the abundance of legislative reform targeting one or the other code has led to a worrying degree of overlap and confusion relating to the applicable rules in relation to driving offences. Certain measures are present in both the Code Pénal and the Code de la Route, and not always in the same terms, which is confusing at best and potentially misleading at worst. Poor drafting can be linked to the reactive approach to legislation in this field, in which new laws are generally passed on the back of some incident or public campaign about a specific issue, rather than following a more thorough and reflective process.[44] The complexification of the regime of driving-related offences is also reflected in the range of different procedures, which are generally dealt with in different courts with sometimes varying degrees of expertise.[45] In fact, it has been claimed that the 2003 reform has led to a regime of responsibility for driving-related offences which has become so specific that it can now be seen as a "technical area of criminal law [which] should be contained exclusively in the Code de la Route"[46] and not in the more general Code Pénal.

In comparison with those sometimes complicated regimes of liability, serious driving offences resulting in death or personal injury in French criminal law are relatively simple, and their application in practice reflects some aspects of the legislative agenda outlined in the first part of this chapter, with its aims of prevention, sensitisation, and overarching repression.

4.2 Liability for Serious Driving Offences

Having presented the background to road safety legislation in France, this second section will explore the principles of liability underlying serious driving offences

42 Criminal Chamber of the Cour de Cassation, 21 September 2004, no. 03-86.660.

43 Criminal Chamber of the Cour de Cassation, 13 January 2009, no. 08-85.587, Bull. Crim. 2009, no. 11, and 2 September 2010, no. 10-82.394 and no. 10-82.393.

44 *E.g.* changing 'under the influence' to 'usage' regarding the use of drugs while driving or increasing the penalty for fleeing the scene of an accident.

45 First instance local courts, known as 'juge de proximité', which deal with the bulk of low-level driving offences, are known to make common mistakes linked to the complex legal provisions and this leads to many appeal cases.

46 Rassat 2011, paragraph 329. According to the author, the presence of driving offences in the general Code Pénal represents a problem in terms of legislative method, and is not appropriate.

in French criminal law. Driving dangerously is not in and of itself recognised as an offence in French criminal law, although the Code de la Route criminalises a wide range of behaviour which would amount to dangerous driving. These cover speeding[47] but also various violations of driving regulations, including dangerous overtaking, not indicating before turning and speeding up while being overtaken.[48] In addition to this myriad of smaller offences targeting dangerous driving, there are three main offences which deal with serious driving offences, based on the related 'general' offences for involuntarily causing death and injury.[49] Since 2003,[50] each of those three articles set out in the Code Pénal contains a subsidiary offence when it is committed while driving a vehicle. The elements of serious driving offences are therefore essentially the same as causing death or injury through any other means, although the penalty will be higher, based on a triple-tiered aggravation scale. However, the particularity of serious driving offences goes beyond a mere aggravation of sentences, and the evolution of the rules of causation and fault has affected the regime of liability for drivers who kill or injure others while driving. The first part of this section (Section 4.2.1) will present the relevant offences and the degrees of aggravation they introduce, and the second and third part (Sections 4.2.2 and 4.2.3) will examine how the evolution of the general principles of fault and causation has contributed to the creation of a very severe regime of liability for serious driving offences.

4.2.1 Offences for Involuntary Manslaughter and Involuntarily Causing Injury

4.2.1.1 The Substantive Offences

The French Penal Code creates three specific offences to deal with instances of involuntarily causing death or injury. Article 221-6 makes it an offence to involuntarily cause the death of another, while Articles 222-19 and 222-20 create offences of involuntarily causing injury to another, depending on the severity of the injuries in question. The 2003 reform, designed to "reinforce the fight against road violence", created three additional offences to target involuntary homicide and the causing of injury in the specific context of driving.[51] For each type of offence, the general offence and the driving-related offence adopt the same terms, but the sentence is increased if the result is caused while driving a vehicle.

47 Speeding is criminalised on an aggravating scale, imposing a fine and a withdrawal of points depending on the gravity of the offence (Articles R. 413-14 and R. 413-1-1 Code de la Route). If the speed is in excess of 50 km/h over the limit and the defendant is a recidivist, the sanction can be up to 3 years' imprisonment (Articles L. 413-1 Code de la Route and 132-11 Code Pénal).

48 Respectively Articles R. 414-4, R. 412-10 and R. 414-16 Code de la Route. There are numerous other offences, most of which are punishable by a fine and withdrawal of points, or withdrawal of the driving licence entirely.

49 In very specific cases where the intention to kill or commit violence can be proved, the defendant can also be charged with murder, attempted murder or violent homicide with no intention to kill, based on Articles 221-1 and 222-7 Code Pénal. The use of a vehicle has consistently been recognised as a weapon since 1989. *See* Criminal Chamber of the Cour de Cassation, 14 March 1989, Bull. Crim. 1989, no. 129.

50 Following Act no. 2003-495, 12 June 2003. *See* Section 4.1.2.

51 Act no. 2003-495, 12 June 2003.

The Code Pénal states that "causing the death of another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations, in the circumstances and according to the distinctions laid down by Article 121-3, constitutes manslaughter."[52] The list of possible mental states does not indicate specific discrete categories of *mens rea*, but rather reflects the general category of 'non-intentional fault', which is distinguished from intention in Article 121-3.[53] Together, intention and non-intentional fault constitute the general notion of fault in the criminal law, which comprises states of mind equivalent to the common law notions of intention, recklessness and even negligence. According to Article 221-6-1, if causing death in that same way, where the "clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence" is committed by the "driver of a motor vehicle", then the sentence for manslaughter is increased from 3 years' imprisonment and a 45,000 euro fine to 5 years' imprisonment and a 75,000 euro fine.

If the same broad level of fault causes a serious injury to another – 'serious' being defined as causing a total incapacitation of work of more than three months – then an offence is committed according to Article 222-19.[54] The causing of serious injury in the same manner while driving a vehicle also leads to an offence being committed, although the sentence will again be higher, going up from 2 years' imprisonment and a 30,000 euro fine to three years' imprisonment and a 45,000 euro fine.[55]

Finally, causing a less serious injury, where the incapacitation of work is equal to or less than three months, can also result in a criminal offence, whether it is caused by driving or not. For this lesser offence, however, the degree of fault required varies between the general offence and the driving offence. While Article 222-20, which creates the general offence, can only be committed if there is a "manifestly deliberate violation of a particular obligation of safety or prudence imposed by statute or regulation", the corresponding driving offence laid out in Article 222-20-1 refers to the offence being committed by "clumsiness, rashness, inattention, negligence or breach of a statutory or regulatory duty of safety or prudence provided for by Article 222-19." The degree of fault required for the offence of causing mild injury is therefore broader where it is committed while driving, and matches that required for other serious driving offences. The sentence is also higher, rising from 1 to 2 years' imprisonment and from a 15,000 euro fine to a 30,000 euro fine.

52 Article 221-6 Code Pénal. Official translation via <www.legifrance.gouv.fr>.

53 Article 121-3 Code Pénal. The notions of clumsiness, rashness, inattention or negligence mentioned in the provision are rarely explored individually, but appear to be subsumed into the concept of negligence and imprudence, which constitute one part of 'non-intentional fault', along with other 'qualified' faults. The appreciation of these concepts of negligence and imprudence is traditionally done 'in concreto', examining the facts and competences of the defendant in the given case, rather than relying on a specific definition. *See* Section 4.2.2.1 on 'fault' and Brajeux & Spencer 2010 for a discussion of the concept of fault in French criminal law.

54 The fault requirement is the same as Article 221-6 and will therefore be determined in accordance with Article 121-3.

55 Article 222-19-1 Code Pénal.

4.2.1.2 The Aggravating Scale

In substantive terms, serious driving offences therefore represent essentially an aggravation in sentencing based on the general offences. In practice, however, the driving-related offences based on Articles 221-6, 222-19 and 222-20 do not just create one level of aggravation in relation to sentencing, but also include two additional levels of aggravation based on the existence of certain specific circumstances, detailed in the second paragraph of each provision.[56] This effectively creates three steps of aggravation for serious offences committed while driving, all based on one specific offence. Firstly, the sentence is raised by the sheer fact that the offence is committed while driving a vehicle, irrespective of any additional degree of fault. Secondly, each offence presents a series of circumstances in the presence of which the sentence will be further aggravated. Although some of these circumstances represent criminal offences in their own right, the aggravation they cause does not affect the defendant's liability for the corresponding full offences. The circumstances in question are:[57]

- the driver has deliberately violated an obligation of safety or prudence imposed by statute or Regulations other than those outlined below;
- the driver was manifestly drunk or in an alcoholic state characterised by a level of alcohol in the blood or breath greater than the limits fixed by the legislative or statutory provisions of the Traffic Code, or where he refuses to take the tests provided for by the Code and designed to establish the existence of an alcoholic state;
- a blood test shows that the driver had used substances or plants classified as drugs, or where the driver refused to take the tests provided for by the Traffic Code that are designed to establish whether he was driving under the influence of drugs;
- the driver does not hold a valid driving licence as required by law, or his licence has been annulled, invalidated, suspended or revoked;
- the driver has exceeded the maximum speed limit by 50 km/h or more;
- the driver, knowing that he had caused or brought about an accident, did not stop and so tried to escape any criminal or civil responsibility that he might incur.

Thirdly and finally, in the presence of two or more of those circumstances, the articles stipulate that the sentence shall be raised even further.

As a result of these provisions, the aggravating scale for serious offences committed while driving can be summarised as follows:

56 Code Pénal, Articles 221-6-1, paragraph 2, 222-19-1, paragraph 2, and 222-20-1, paragraph 2.

57 As contained in Code Pénal, Articles 221-6-1, paragraph 2, 222-19-1, paragraph 2, and 222-20-1, paragraph 2. Official translation via <www.legifrance.gouv.fr>.

Table 4.1 Aggravating Scale for Serious Driving Offences

	'Straight'	By driving	Aggravating circumstance	2 or more aggravating circumstances
Manslaughter	3 yrs / 45,000e	5 yrs / 75,000e	7 yrs / 100,000e	10 yrs / 150,000e
Injury (>3 mths)	2 yrs / 30,000e	3 yrs / 45,000e	5 yrs / 75,000e	7 yrs / 100,000e
Injury (≤3 mths)	1 yr / 15,000e	2 yrs / 30,000e	3 yrs / 45,000e	5 yrs / 75,000e

This table shows clearly the progression in tariff related to driving offences. Each offence is deemed more serious if it is committed while driving, and even more so if one or more of a range of circumstances can be proved. Before exploring how these offences have been applied in practice, the next section will look at how the general principles of fault and causation interact in French criminal law.

4.2.2 Fault and Causation in French Criminal Law: Complementary Concepts

The key elements in French criminal offences are similar in principle to the traditional elements required in most criminal offences throughout a range of legal systems: an act, a mental element, and a causal link between the act and the result. As was presented in the previous section, the act required for serious driving offences is explicitly defined in the substantive offences: it is the act of driving a vehicle. However, the fault requirement and the concept of causation are not written into the provisions themselves. In fact, as with many other offences, the offences that were outlined in the previous section do not define the concept of fault, but instead rely on general principles contained in the Code Pénal which establish the nature of both fault and causation to varying degrees of clarity. The following section will present an overview of the general concept of fault in French criminal law and how it relates to causation, outlining the particular characteristics which are relevant when considering driving offences. In particular, legislative reforms and judicial interpretation have created a complementarity between the principles of fault and causation, which imposed a particularly severe regime of liability for serious driving offences.

4.2.2.1 Fault and Causation in French Criminal Law

Fault

The general concept of fault in French criminal law is defined in Article 121-3 of the Code Pénal: "There is no felony or misdemeanour in the absence of an intent to commit it."[58] Intention is therefore set out as the default requirement for all offences in French criminal law. The second paragraph of the article, amended in 1996, also recognises the possibility of criminal liability if specified by statute for "deliberate endangering of others". The third paragraph adds that liability may also be found "in cases of recklessness, negligence, or failure to observe an obligation of due care or precaution imposed by any statute or regulation, where it is

58 Article 121-3 Code Pénal. Official translation via <www.legifrance.gouv.fr>.

established that the offender has failed to show normal diligence, taking into consideration where appropriate the nature of his role or functions, of his capacities and powers and of the means then available to him."[59]

The provision was further amended in 2000, adding another paragraph which states that liability in cases of indirect causation will be established in the case of defendants who "have not directly contributed to causing the damage, but who have created or contributed to create the situation which allowed the damage to happen or who failed to take steps enabling it to be avoided."[60] In such a case, the individual will be "criminally liable where it is shown that they have broken a duty of care or precaution laid down by statute or regulation in a manifestly deliberate manner, or have committed a specified piece of misconduct which exposed another person to a particularly serious risk of which they must have been aware."[61] Although these successive and rather rapid[62] amendments to Article 121-3 were explicitly aimed at clarifying the liability of mayors and public officers in cases of involuntary homicide,[63] they have created new principles of fault and causation which apply to all such offences, irrespective of the function of the perpetrator.

Since 2000, French criminal law therefore recognises two levels of fault, related to the type of causal link between the act and its harmful consequences. If the causation is direct, then the individual will be considered liable if he has committed a simple fault, which includes intention, recklessness, negligence and any failure to observe an obligation of due care and precaution imposed by statute or regulation. If the causal link is indirect however, there is a requirement to prove a qualified fault, which includes either the *deliberate* violation of an obligation of due care or precaution laid down by statute or regulation (*faute délibérée*), or conscious risk-taking in a particular situation (*faute caractérisée*). The more remote the causal link, the higher the degree of fault which must be established.[64] These two degrees of fault establish three alternative routes through which liability can be established if the material element of an offence is proved. The degree of fault which the prosecution will have to prove will depend on the causal link which

59 *See* note 58. The latter part of this provision was added following pressure on the French government regarding the regime of liability for mayors and officials, who were often found guilty of involuntary homicide on the basis of fault according to Article 121-3. It aimed to narrow the conception of fault by clarifying what would count as 'negligence'. For more details on the origins of this reform, *see* Brajeux & Spencer 2010, pp. 1-24.

60 Article 121-3 Code Pénal. Author's translation.

61 Article 121-3 Code Pénal. Author's translation.

62 One commentator remarked that if four years represented an appropriate interval for sporting events, it was undesirably short for a reform of basic principles of criminal liability. *See* Desportes & Le Gunehec 2003, paragraph 461.

63 The breadth of the concept of non-intentional fault in French criminal law led in the second half of the twentieth century to a high number of cases holding public and administrative personnel criminally liable for accidental deaths for which they were remotely responsible because of their official duties. These reforms were intended to limit and clarify the reach of liability in those cases. For a more detailed account of this trend, *see* Mouthouh 2000.

64 Teachers, town mayors and other administrative agents could rarely be seen to be the primary or direct cause of death, but in cases where their degree of fault was particularly high, the aim of the reform was to hold them liable for deaths or injury despite the indirect causation. For more details of the origins of this legislative reform and its content, *see* Brajeux & Spencer 2010.

exists in practice: if the causation is direct, only a simple fault will be necessary, whereas if the causation is indirect, the degree of fault required will be either deliberate or a conscious risk-taking.

Causation

The concept of causation, irrespective of its direct or indirect qualification, is not a straightforward notion in French criminal law. Three main theories are generally identified, each of which might theoretically be applied. First, 'l'équivalence des conditions' represents a concept of causation according to which all the events and actions which led to the occurrence of the harm or damage are treated as equivalent, and each can be treated as its cause from a legal perspective. The second theory is referred to as 'la proximité des causes', which singles out as the legal cause that which is closest in time to the eventual damage, and the third one is 'la causalité adéquate', according to which the most usual or appropriate cause of a particular type of damage will be the legal cause.[65]

In general, French criminal law rejects the strict theory of 'proximité des causes',[66] preferring either the first or third theory. The principle of 'causalité adéquate' represents a minority of cases, illustrated by a famous case in which a careless driver knocked over the rider of a petrol-assisted bicycle, who promptly remounted, chased his accidental assailant yelling abuse, and in the process got so excited that he had a heart attack and died. The driver's initial conviction for involuntary manslaughter was quashed upon appeal, based on the lack of a causal link between the initial accident and the actual death.[67] The more punitive theory of 'l'équivalence des conditions' represents the usual choice for French courts when dealing with causation in criminal cases, albeit with certain key restrictions: as a result, any event which has a logical connection, however remote with the eventual damage, can be considered as a legal cause. This approach was confirmed in a complex and sensitive medical case where the 'faute' happened in the initial consultative stage of the operation and was mainly characterised by a lack of communication between the doctors involved. Despite the lack of temporal proximity, the Cour de Cassation found that the existence of an "essential and defining fault"[68] could form the basis of a causal link.

65 A student textbook uses the hypothetical case of a negligent driver who knocks down a pedestrian, who in hospital receives infected blood and years later dies of AIDS as an illustration of those three theories. According to the first one, both the driver and the doctors responsible for the transfusion could be treated as having caused the death of the pedestrian, whereas the second and the third theory would both focus on the transfusion itself as a cause of the death, and the driver would in all likelihood avoid liability for manslaughter. *See* Desportes & Le Gunehec 2003, paragraphs 446-447. Author's translation.

66 Although reports leading to the 2000 reform of Article 121-3, related below, explicitly embraced immediacy as a necessary requirement of direct causation, the courts have never followed suit and generally adopt a broader conception of causation, whether before or after the reform. *See* Cotte & Guihal 2006.

67 Criminal Chamber of the Cour de Cassation, 25 April 1967, Gaz. Pal., 1967, I, 343. And compare the case of the motorist whose victim died of an infection contracted in hospital. *See* note 91.

68 Criminal Chamber of the Cour de Cassation, 29 October 2002, Bull. Crim. 2002, no. 196.

However broad it may seem, French criminal law's reliance on the equivalence theory is tempered in practice by the fact that an intact and certain causal link between the act and the harmful result remains a clear and indispensable requirement of criminal offences, especially those resulting in death or physical injury. This "principe de certitude" is held as a crucial rampart against the risk of "reducing criminal responsibility to the gravity of the mistake or *mens rea* and the harmful result, and deduce causation from these two combined."[69] In a speech assessing the 5-year anniversary of the 2000 reform amending Article 121-3, the President of the Criminal Chamber of the Cour de Cassation affirmed that the risk of "an indefinite extension of causation"[70] had been avoided by the courts' interpretation of the provisions, as illustrated by decisions which found a lack of causal link in situations where the cause of the harm could not clearly be identified or the chain of causation had been broken by another act.[71]

The 2000 reform also added an additional degree to the determination of causation, distinguishing between direct and indirect causation. Whereas direct causation is not itself substantively defined in the Code Pénal, indirect causation is given a definition, according to which "responsibility ensues from all the acts or omissions without which the accident could not have happened, even if they did not make it reasonably foreseeable, and also from all the acts from which the harm has originated, even if they have not played a triggering role in the process that caused it."[72] While the distinction between direct and indirect may seem easy to apprehend in theory, practice has not provided a clear guide as to where the line exactly falls between the two, as is exemplified by a very large body of case law, relating particularly to involuntary manslaughter.[73]

Beyond the definition of direct and indirect causation (or lack thereof in the case of the former), this two-tier approach to causation is mostly relevant for the interdependence it potentially creates between the concepts of causation and fault, as will be discussed in the following section.

4.2.2.2 Fault and Causation: Uncomfortable Bed Fellows or Nuanced Complementarity?

Through its amendment of Article 121-3, the reform passed in 2000 has effectively linked the nature of fault to the finding of a causal link by the courts. The stated aim of the reform was to reduce the criminal liability of local mayors and teachers in accidents, while preserving responsibility in truly 'deserving' cases, in particular driving and work safety cases. However, this reform has also had wider implications in relation to the appreciation of the concept of fault in criminal

69 Mayaud 2003. Author's translation.

70 Cotte & Guihal 2006, paragraph 9.

71 The latter was illustrated by using a driving-related case in which the victim of the accident eventually died of an unrelated hospital infection. *See* note 91.

72 Article 121-3 Code Pénal.

73 A summary of it, extending to some 50 pages, will be found in the commentary to Article 221-6 of the Nouveau Code Pénal in the annual Dalloz edition of the Code Pénal. A much fuller account is given in Mayaud 2003.

law, and in particular cases concerning serious offences dealing with injury and manslaughter.

In some ways, this reform has therefore led to causation becoming the "Gordian knot of criminal responsibility in non-intentional matters."[74] The division of the concept of causation into two separate categories has introduced a degree of complementarity between the nature of fault and the nature of the causal link, one relying on the other for its definition and determination. The essence of the decriminalisation process relating to the liability of public officials has been carried out through this concept of causation, and "the requirements regarding the fault are not the same anymore, depending on whether causation is direct or indirect."[75]

At the time of the reform, concerns were raised that this complementarity could create a risk that the qualification of the causal link, by taking on such a crucial role in the determination of criminal liability, could be manipulated and that the concept of fault could be rendered obsolete.[76] However, and although some procedural difficulties relating to the requalification of the causal link during trial have been acknowledged,[77] the consensus seems to be that rather than creating chaos and confusion, the reform has introduced a "nuanced articulation between fault and causation."[78] In terms of case law, the requalification of the causal link has not ultimately affected the findings of liability in the few concerned cases which are reported. Rather than dismissing the case entirely, in those cases the Cour de Cassation preserved the existence of liability by also finding that a higher degree of qualified fault existed.[79] In other cases, the courts have refused to requalify the causal link as indirect, despite the high degree of fault present, thereby preserving the certainty of causation as a crucial principle of criminal responsibility.[80] Whether the success of the reform can in fact be attributed to the "deftness and precision" in the conception of these new legal categories, as was claimed by the President of the Criminal Chamber of the Cour de Cassation in 2006,[81] in practice the stated aim of the 2000 law appears to have been achieved: to attenuate liability for mayors and official agents while preserving that of drivers and employers who kill or injure. The appreciation of this success therefore brings us back to the

74 Mayaud 2005, p. 71.

75 Mayaud 2005, p. 71.

76 Pradel 2000.

77 *See* Véron 2011, in which the author warns that a change of qualification of the causal link can lead to a necessary rethink of the prosecution's and defence's arguments in the case mid-trial.

78 Mayaud 2007, p. 82.

79 *See* in particular Criminal Chamber of the Cour de Cassation, 12 September 2006, Droit Pénal no. 1, January 2007, comm. 4 (a medical case), and 31 August 2011, no. 10-88.093 (a workplace accident case). *See* commentary in Véron 2011.

80 As shown by a recent case involving an aircraft incident which caused the death of two passengers and in which the court refused to establish a causal link, whether direct or indirect, despite the high degree of fault. Judges of the Paris Court of Appeal refused to be blinded by the grossly and wilfully reckless behaviour of the defendant in assessing the causal link. Court of Appeal of Paris, 16 November 2001, no. 00/05087. *See* commentary in Mayaud 2002.

81 He also mentions the role of the judiciary and their pragmatic approach in applying and interpreting the provisions. *See* Cotte & Guihal 2006, introduction and paragraph 50.

regime of liability in serious driving offences, and the next section will examine how the principles of fault and causation combine to make that regime extremely severe.

4.2.3 Fault and Causation in Serious Driving Offences: Creating a Severe Regime of Liability

This section will present how the principles of fault and causation following the 2000 reform of French criminal law have combined to make the regime of liability for serious driving offences particularly severe. Causation in driving cases will in most cases be recognised as direct causation, a categorisation which only calls for a finding of simple fault under Article 121-3, as was presented in the previous sections. The definition of 'faute simple' in French law and the nature of driving regulations contribute to a quasi-automatic finding of fault, leading to a finding of liability in a high majority of driving cases.

4.2.3.1 Causation in Serious Driving Offences

In terms of serious driving offences, the nature of the accidents which lead to death or injury will often create a clear and obvious causal link, as "the physical contact between the person responsible for the accident or a thing controlled by him and the [victim – '*siège du dommage*'] generally comes within direct causation."[82] The vehicle is treated as an extension of the defendant, and the collision which will generally take place between that vehicle and the victim (or his vehicle) creates an immediate physical contact which causes the death or the injury. The circumstances of the case will therefore often be categorised as the immediate cause of the death or injury when assessing the facts of the case, bringing it squarely within direct causation.

In some cases however, the courts have also made use of the broad definition of direct causation and relied on the criteria of an act representing a determining parameter in the harmful result as sufficient to establish causation – and arguably preserve liability. So when a driver, travelling at excessive speed, lost control of his car after he accidentally hit a wild boar which had suddenly run across the road in front of him, causing him to swerve for 100 metres before colliding with an oncoming car whose driver died in the resulting crash, the Cour de Cassation refused to accept the argument that his 'faute' in driving at excessive speed was only the indirect cause of the death.[83] And it took a similar line when the driver of a heavy lorry negligently crashed, so rupturing some of the sacks that he was carrying and releasing a cloud of powder which temporarily obscured the vision of some other drivers, who then crashed as well.[84] These cases illustrate clearly the extent to which direct causation can be applied in driving cases when finding liability. The finding of a direct causal link in serious driving offences will not however necessarily be automatic, and some cases have led to findings of indirect

82 Cotte & Guihal 2006, paragraph 19. Author's translation.
83 Criminal Chamber of the Cour de Cassation, 25 September 2001, Bull. Crim. no. 188.
84 Criminal Chamber of the Cour de Cassation, 29 April 2003, no. 01-88.592.

causation, or indeed no causal link at all. While cases relying on indirect causation for driving offences are rare, it has been recognised in at least two instances since the introduction of the reform. The first case, which went to the Cour de Cassation on appeal, concerned a garage owner who had lent a car to a client who then had a fatal collision, killing herself and injuring others.[85] The garage owner was charged with involuntary homicide, based on the fact that the state of the tyres on the car had played a significant role in the accident, and that he had therefore indirectly caused the death and injury of the victims.[86] This decision was followed in a more recent case by the Court of Appeal of Montpellier, which saw the conviction of a director of a transports company for involuntary homicide, based on his role in an accident where the hook of a trailer attached to one of his vehicles broke, causing a collision between the trailer and another car in which three people died.[87] Again, the defendant was found to have indirectly caused the death of the victims, because of his role in the company and his knowledge of the dodgy repair work that had been done to the faulty hook.[88] These two cases illustrate the role that the complementarity of fault and causation highlighted above can play when establishing liability in serious driving offences. The reasoning in both cases shows clearly that the high degree of subjective fault the courts felt had been shown by the defendants seemed to lead to a finding of liability, despite the lack of a direct causal link. This reasoning mirrors the initial reasons for introducing the reform of causation, which called for the imposition of liability in cases where decision makers and official agents had indirectly caused death or injury by making seriously bad decisions and taking unconscionable risks.[89] These cases, while they do not represent the majority of driving-related cases, do suggest that this reasoning can apply to the driving-specific offence of Article 221-6-1 in the same way that it applies to the general offence provided for in Article 221-6.[90]

Finally, the courts have also introduced some limits to the certainty of the causal chain in some cases where the driving itself becomes too remote to be realistically attached to the harmful result. For example, in a case where a driver, temporarily blinded by the sun, hit a person on a pedestrian crossing, who was taken to hospital with a broken bone in his foot, where he contracted a 'hospital infection', and died, the Cour de Cassation quashed the conviction and sent the

85 Criminal Chamber of the Cour de Cassation, 4 February 2003, Dr. Pénal 2003 comm. 71, obs. Véron.

86 The garage owner was also found to have committed a 'faute caractérisée' or acted in conscious risk-taking (necessary to establish liability in case of indirect causation), because of his specialist knowledge and the fact that he would have known the car was in a dangerous technical state.

87 Montpellier Court of Appeal, 16 March 2010.

88 In a similar reasoning to the 2003 decision, the defendant's specialist knowledge and apparent disregard for safety were found to represent a characterised fault, thereby justifying the imposition of liability.

89 *See* Section 4.2.2.1 on 'causation'.

90 It is worth noting that although liability in those cases seems mostly related to the defendants' roles and responsibilities, the fact that the harm was caused in a driving accident will trigger responsibility under Article 221-6-1 of the Code Pénal, thereby calling for a higher possible sentence.

case back for a retrial, on the ground that the trial court had failed to examine whether, on these facts, there was any causal link at all.[91]

These few cases where an indirect causal link (or no causal link at all) is found show that general rules of causation do apply in driving-related cases, and that a finding of direct causation, while very likely, will not be automatic. However, in the many cases where the causal link is classified as direct, the fact that the offence was committed while driving will therefore affect the criteria of fault, and have serious consequences in terms of liability.

4.2.3.2 'Faute Simple' and Quasi-Automatic Liability

As the causal link in most driving-related accidents will be classified as direct, this means that the fault requirement for any offence of involuntarily causing death or injury will be based on the concept of 'faute simple'. According to Article 121-3, as was mentioned above, a simple fault is a very broad concept which can include recklessness and negligence, but also the "failure to observe an obligation of due care or precaution imposed by any statute or regulation" and the failure to show "normal diligence" in any particular role or function.[92]

In addition to the broad standards of negligence and recklessness, the notion of normal diligence is particularly relevant to serious driving offences. Statutes and regulations contained in the Code de la Route impose certain rules of conduct when driving, and thus create a standard of behaviour for any individual in his quality as a licensed conductor of a vehicle.[93] Failure to observe these statutes and regulations with normal diligence will result in a finding of fault sufficient to establish liability for offences of manslaughter and causing injury. This reasoning was recognised by the Cour de Cassation in 1997, when it found that "failure by the driver of a vehicle to observe his obligations of prudence and security is necessarily incompatible with the normal diligences that the Code de la Route imposes, and therefore entails a fault as defined by the law."[94] According to a leading commentator, this decision adopts a common sense approach in creating a degree of fault by implication rather than presumption. The Cour de Cassation's decision preserves the principle of a concrete appreciation of fault, but also recognises the far-reaching logical conclusion of the wording of Article 121-3 in relation to driving. As it was observed regarding the decision:

> there is a natural incompatibility between the lack of control of a vehicle and the pretence of normal diligences, the failure inherent to the former being the very proof of the inexistence of the latter. Because the obligation of remaining in control of one's vehicle cannot be conceived without the observation of all normal diligences

91 Criminal Chamber of the Cour de Cassation, 5 October 2004, Bull. Crim. no. 230.

92 Article 121-3 Code Pénal. *See* Section 4.2.2.1 on 'fault'.

93 *See* notes 47 and 48 for examples of regulations contained in the Code de la Route.

94 Criminal Chamber of the Cour de Cassation, 24 June 1997, Bull. Crim., no. 451: "tout manquement par le conducteur d'un véhicule à ses obligations de prudence et de sécurité est nécessairement incompatible avec les diligences normales que lui impose le Code de la Route et caractérise à sa charge la faute définie par la loi du 13 mai 1996."

> necessary to that degree of control, it goes without saying that a failure on that front implies the insufficiency of the required diligences, and entails by that very fact the fault which generates criminal responsibility.[95]

The infallible logic of this interpretation combined with the breadth of the notion of fault in French criminal law means that in almost all cases leading to death or injury because of a driving accident, the defendant will be found at fault. Even if he was not legally negligent or reckless, failure to control one's vehicle by nature would almost systematically represent the proof of a failure to observe the normal diligences required when driving. To put it another way, a driver respecting the rules and regulations required of him and applying a normal diligence to conducting his vehicle would be very unlikely to provoke a collision and cause death or serious injury.[96] Just as there is no smoke without fire, the attitude of French courts in relation to findings of fault in cases of serious driving offences could be characterised as there being no accident without a simple fault.

4.3 Sentencing and Serious Driving Offences: A Mitigating Factor?

The combination of this conception of fault with the appreciation of causation in serious driving offences therefore creates an incredibly severe regime of liability for drivers who kill or injure others. This is in keeping with the legislative agenda put forward in terms of road safety over the last decades, and certainly matches the school of public opinion when it comes to dangerous drivers. This severity is also reflected in the very high sentences available to the courts for serious driving offences. As was presented earlier, the 2003 reform introduced stand-alone offences of causing death or injury when driving, with sentences ranging from 2 years' imprisonment and a 30,000 euro fine for causing minor injury with no aggravating circumstances to 10 years and 150,000 euros for involuntary manslaughter with 2 or more aggravating circumstances.[97]

In practice, the sentencing regime of these offences has followed suit and high sentences have been imposed in recent years for serious driving offences, and in particular a very high rate of custodial sentences. According to the latest figures in 2010, 96% of convictions for involuntary homicide by driving have resulted in a prison sentence,[98] in addition to almost 60% of cases of causing injury (of whatever degree) by driving. There is one important catch to these figures, however:

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95 Mayaud 1997, p. 838. Author's translation.

96 Case law does allow for a defence of 'contrainte' or 'force majeure', for instance when the driver suffers a "brutal and unpredictable" medical episode (Criminal Chamber of the Cour de Cassation, 15 November 2005, Bull. Crim. no. 295), although any contributory fault on the part of the driver will negate that defence, for example where the driver was aware of a pre-existing condition and had only slept three hours the night before taking the road (Criminal Chamber of the Cour de Cassation, 11 May 2004, *RSC* 2004. 878, obs. Mayaud).

97 *See* Table 4.1 in Section 4.2.1.2.

98 *See* 'Annuaire statistique de la justice: Édition 2011-2012', La Documentation française, Direction de l'Information Légale et Administrative, Paris 2012.

few of these defendants will ever actually see the inside of a prison cell. Indeed, the French criminal justice has a habit of making an extensive use of suspended sentences, and serious driving offences are no different. In fact, of the prison sentences pronounced in 2010 against negligent drivers who kill or injure others, 80% were fully suspended.[99] Custodial sentences which involve actual prison time represent only a third of convictions for involuntary homicides while driving, and less than a fifth of convictions for involuntarily causing injury while driving.[100]

These figures help draw a more nuanced and contrasted picture in relation to the regime of liability for serious driving offences in French criminal law. The legislative agenda, substantive legal reforms and the judicial interpretation of the relevant provisions have all contributed to creating an incredibly severe regime of liability for negligent drivers who kill or injure others. And while the sentences given against such drivers have generally been relatively high, the extended use of suspended custodial sentences in the French criminal justice system introduces a significant degree of relief in terms of the severity of the regime of liability. Despite very strong public opinion against negligent drivers in France, a position which is arguably stoked by extensive and shocking communication campaigns, it seems accepted that a criminal conviction will generally carry a sufficient stigma to signify that disapproval. As accident rates continue to improve and general information and awareness of road safety increases, it will be interesting to see how the school of public opinion will evolve when faced with serious driving offences.

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99 *See* 'Annuaire statistique de la justice' at note 98. Fully suspended sentences represent almost 70% of custodial sentences handed to negligent drivers who kill, and 80% of the custodial sentences in cases of negligent drivers who cause injury. Some suspended sentences are accompanied by conditions, but most of them were free of any requirements.

100 *See* 'Annuaire statistique de la justice' at note 98. Although the average length of the custodial is relatively high: 16 months for involuntary homicide and 6 months for involuntarily causing injury.

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Chapter 5

Serious Traffic Offences: The German Perspective

Ingke Goeckenjan[*]

5.1 Introduction

In March 2011, a forty-year-old car driver suffered an epileptic seizure while driving in Eppendorf, a residential quarter of Hamburg.[1] He lost control of his vehicle and crashed into several pedestrians and cyclists. Four people died, and three were seriously injured. The victims who lost their lives happened to be well-known personalities: a social scientist, an artist, and an actor and his wife.

The driver was prosecuted. During the criminal proceedings, it became apparent that the defendant had been suffering from epilepsy for several years. He must have known that he was posing a danger to other road users: not only had he been advised to refrain from driving by his doctors, but he had also been involved before in car accidents as a result of his condition. In June 2012, the Regional Court of Hamburg convicted the defendant of negligent homicide in four cases, negligently causing serious bodily harm in three cases and intentional endangerment of road traffic. It imposed a penalty of three and a half years' imprisonment[2] – a sentence that excludes probation.

This case demonstrates some of the prominent characteristics of serious traffic crime: suspects seldom have a criminal record, and the violation of obligations in itself may seem relatively minor, but the consequences can be devastating. According to a distinction commonly made in German criminal doctrine, one might say that the "ills of the conduct" may be slight, but the "ills of the results" can be severe.[3] In general, it can be said that traffic crime, in contrast to most other crimes, can potentially be committed by anybody at any time. Its only precondition may be a momentary inattentiveness while driving – which may happen to any of us.

In this chapter, I want to give an overview of how the German criminal law and criminal courts deal with serious traffic offences. At the beginning, some background information is presented necessary for comprehending the specifics

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1 Regional Court of Hamburg 5 June 2012, 628 KLs 18/11.

2 Regional Court of Hamburg 5 June 2012, 628 KLs 18/11.

3 *See* Roxin 2006, Section 10 margin no. 88 *et seq*.

of serious traffic offences under German criminal law. After that, the most important provisions relating to serious traffic crime will be described. Subsequently, I want to focus on two aspects: the requirements of conditional intent to kill in cases of dangerous driving and the lower limits of negligence. In doing so, I will give an insight into the jurisdiction of the highest German court in criminal matters, the Federal Court of Justice (*Bundesgerichtshof*). Finally, some conclusions on the specifics of serious traffic crime under German law will be drawn.

5.2 Some Background Information

In German law, there is a distinction between two kinds of criminal offences (Section 12 Criminal Code). Felonies (*Verbrechen*) are unlawful acts that are punished with a minimum sentence of one year's imprisonment. Misdemeanours (*Vergehen*) are punishable by a minimum sentence below one year's imprisonment or by fine. This distinction is relevant with regard to criminal liability for attempt. Any attempt to commit a felony entails criminal liability, whereas attempted misdemeanours attract criminal liability only if the law expressly provides for this consequence (Section 23 Criminal Code). To commit an attempt any degree of intent, including conditional intent, suffices.

There is a third category of unlawful acts: regulatory offences (*Ordnungswidrigkeiten*). In contrast to crimes, regulatory offences are minor violations and come under administrative law. They can only be sanctioned by fines, not by prison sentences. With regard to road traffic, most violations are actually dealt with by administrative law. The most important regulation is Section 24a Road Traffic Act (*Straßenverkehrsgesetz*). According to this provision, driving a motorised vehicle with a Blood Alcohol Content (BAC) of 0.05% or more is sanctioned by a fine up to 3,000 euros.

But as this book is focussing on *serious* traffic violations, more importance must be attached to criminal offences. Criminal liability generally requires intent (*Vorsatz*). Acts of negligence (*Fahrlässigkeit*) are only punishable if this is explicitly provided by law (Section 15 Criminal Code).[4]

If a crime is found to have been committed, the court is free to impose any punishment that is within the scope allowed by the relevant regulation. It is reported that the prosecution services in the respective court regions keep lists describing the types of traffic violations which indicate the sentence to request. It is important to know, however, that these lists are not binding (not even for the prosecution) but are mere internal guidelines. Most offences committed in the context of road traffic do not have an obligatory minimum sentence. The aspects that have to be taken into consideration in order to determine a fair sentence are

4 Section 15 Criminal Code:
Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability.

listed in Section 46 Criminal Code.[5] They include, among others, the motives and aims of the offender, the attitude reflected in the offence, the consequences of the offence, the offender's prior history and the offender's conduct after the offence.

Besides the two principal penalties – fine and imprisonment – the courts can impose the ancillary penalty of a temporary driving ban for a period of one to three months (Section 44 Criminal Code).[6] This sanction is of high importance in the context of traffic crime, since it is typically imposed in cases of drink-driving or endangering road traffic.

All criminal penalties require the proof of guilt. But in some cases of traffic offences, the capacity for guilt is excluded due to abuse of alcohol. As a rule, German courts consider the excuse of insanity (Section 20 Criminal Code)[7] if it turns out that the accused had a BAC of 0.3% or more at the time of the commission of the offence.[8] Then criminal liability may only be established under the prerequisites of Section 323a Criminal Code (committing offences in a senselessly drunken state):

(1) Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be liable to imprisonment not exceeding five years or a fine if he commits an unlawful act while in this state and may not be punished because of it because he was insane due to the intoxication or if this cannot be excluded.
(2) The penalty must not be more severe than the penalty provided for the offence which was committed while he was in the drunken state.

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5 Section 46 Criminal Code:
(1) The guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender's future life in society shall be taken into account.
(2) When sentencing the court shall weigh the circumstances in favour of and against the offender. Consideration shall be given to: the motives and aims of the offender; the attitude reflected in the offence and the degree of force of will involved in its commission; the degree of the violation of the offender's duties; the modus operandi and the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history, his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused as well as the offender's efforts at reconciliation with the victim.
(3) Circumstances which are already statutory elements of the offence must not be considered.

6 Section 44 Criminal Code:
(1) If a person has been sentenced to imprisonment or to a fine for an offence committed in connection with the driving of a motor vehicle or in violation of the duties of a driver of a motor vehicle, the court may impose a ban prohibiting him from driving any class of motor vehicle or a specific class on public roads for a period of from one to three months. A driving ban shall typically be imposed in cases of a conviction under Section 315c subsection (1) No 1(a), (3) or Section 316 unless a disqualification order has been made under Section 69. [...]

7 Section 20 Criminal Code:
Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of his actions or to act in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.

8 *See* Fischer 2013, Section 20 margin no. 19.

(3) The offence may only be prosecuted upon request, authorisation or upon request by a foreign state if the act committed in the drunken state may only be prosecuted upon complaint, authorisation or upon request by a foreign state.

Even if somebody causes another person's death or injury in a drunken state that excludes the capacity for guilt, the unlawful act can only be prosecuted according to Section 323a Criminal Code. Exceptions are only made if the perpetrator is inducing the drunken state already with the intent to commit the subsequent crime (intentional *actio libera in causa*) or if he or she acts negligently with regard to both causing the incapacity for guilt and the subsequent unlawful act (negligent *actio libera in causa*). Although there exist different lines of argumentation to justify this legal concept,[9] the doubts as to its lawfulness prevail. The principle of legality (Article 103, Section (2) German Basic Law as well as Section 1 Criminal Code) also includes the prohibition of customary law (*nullum crimen, nulla poena sine lege scripta*). Since Section 20 Criminal Code regulates the requirement of guilt "at the time of the commission of the offence" and there is no written exception to this regulation, this legal concept violates constitutional law. The Federal Court of Justice refutes the lawfulness of the *actio libera in causa* at least in those cases where the law requires certain modalities of acting (such as driving a vehicle in traffic).[10]

If the accused is found to have committed a criminal offence in a state of insanity or a state of insanity cannot be excluded, only security measures (*Maßregeln der Besserung und Sicherung*) can be imposed. With regard to traffic violations, the most important security measure is the disqualification order (Section 69 Criminal Code).[11] It is applicable if the defendant is convicted of a traffic offence or is not convicted merely because he or she was proved to have acted in a state of insanity or this could not be excluded. Furthermore, his or her act must show that the defendant is unfit to drive a motor vehicle. In contrast to the temporary driving ban under Section 44 Criminal Code, the disqualification order does not only ban from driving motor vehicles but deprives the convict of the driving licence.

9 For further references, *see* Streng 2011, Section 20 margin no. 114 *et seq*.

10 Federal Court of Justice 22 August 1996, BGHSt 42, 235.

11 Section 69 Criminal Code:

(1) If a person has been convicted of an unlawful act he committed in connection with the driving of a motor-vehicle or in violation of the duties of the driver of a motor-vehicle, or has not been convicted merely because he was proven to have acted in a state of insanity or his having so acted could not be excluded, the court shall make a driving disqualification order if the act shows that he is unfit to drive a motor-vehicle. A further examination pursuant to section 62 shall not be required.

(2) If the unlawful act under subsection (1) above is one of the following misdemeanours:
1. endangering road traffic (section 315c);
2. driving while under the influence of alcohol or drugs (section 316);
3. leaving the scene of an accident without cause (section 142) although the offender knows or should have known that a person was killed, seriously injured or significant damage to the property of another was caused in the accident; or
4. committing offences in a senselessly drunken state (section 323a), if the offence committed is one of the offences in Nos 1 to 3

the person shall typically be deemed unfit to drive motor-vehicles. [...]

The court has to determine a period of time while no new driving licence shall be issued (Section 69a Criminal Code). This period can be from six months to five years. If there is reason to believe that the maximum period will not suffice to avert the danger posed by the offender, the court may order a permanent ban (Section 69a, subsection (1), sentence 2 Criminal Code).

Jurisdiction in criminal matters is basically assigned to the Local Courts (*Amtsgerichte*) unless a sentence of imprisonment exceeding four years is expected (Section 24 Courts Constitution Act [*Gerichtsverfassungsgesetz*]).[12] As traffic offenders rarely face a prison term of more than four years, charges are usually brought before the Local Courts. Only under specifically regulated circumstances are traffic crimes dealt with by Regional Courts (*Landgerichte*). In the Eppendorf case, for example, it can be assumed that the severity of the harm caused was the reason the case was brought before a Regional Court.

In general, both the defendant and the prosecution may appeal against first instance decisions.[13] Which court is in charge of the appeal depends on the type of court that made the first instance decision. Against judgments of the Local Court, appeals can be brought before the Criminal Division of the Regional Court, which then ascertains the facts of the case anew (*Berufung*).[14] Against the appellate judgment of the Regional Court, further appeal is only allowed on points of law (*Revision*).[15] This further appeal has to be brought before the Higher Regional Court.[16] The appellate court takes the ascertained facts for granted and only examines whether the law has been applied incorrectly and whether the verdict is not properly substantiated. If somebody is charged with a particularly severe or complicated crime, a Regional Court or, even in some cases, a Higher Regional Court has first instance jurisdiction.[17] Against their verdicts only an appeal on points of law (*Revision*) is admissible, which means that there is only one factual instance.[18] Only in these circumstances, the Federal Court of Justice is in charge of the appeal case.[19]

If a ruling is quashed by an appellate court on points of law, the case is usually referred back to the court of first instance. In the new decision, this court will have to take into account the appellate court's rulings. Apart from that, German courts are not bound by a doctrine of *stare decisis*, such as is found for example in the United Kingdom. Any judge of a lower court is free to deviate from settled jurisprudence of higher courts. However, lower courts usually respect superior

12 Within the Local Courts, the jurisdiction is divided between Local Court judges (*Strafrichter*) who decide on their own (Section 25 Courts Constitution Act) and courts with lay judges (*Schöffengerichte*) which consist of one Local Court judge as the presiding judge and two lay judges (Section 29 Courts Constitution Act). Local Court judges only decide on cases of minor offences in which a penalty more severe than a two-year sentence of imprisonment is not to be expected.

13 Section 296 Code of Criminal Procedure.

14 Section 312 Code of Criminal Procedure; Section 74 Courts Constitution Act.

15 Section 333 Code of Criminal Procedure.

16 Section 121, subsection (1) no. 1 (b) Courts Constitution Act.

17 Sections 74 and 120 Courts Constitution Act.

18 Section 333 Code of Criminal Procedure.

19 Section 135 Courts Constitution Act.

judgments for pragmatic reasons. If they did not, the lower courts would encourage the parties into an appeal with a predictable overturning of the outcome. Therefore, the lower courts pay close attention to the interpretation of the law by the higher courts, especially the Federal Court of Justice.

Similar to the situation in the Netherlands, German cases of traffic crime occasionally centre around the question whether or not the intention to kill or harm other persons can be established. In other cases, it has to be determined whether or not the lower limits of negligence are fulfilled. On both questions, the Federal Court of Justice has developed substantial case law. There are several decisions that quash the lower courts' rulings arguing that the ascertained facts do not suffice to establish intent or negligence or, vice versa, that the ascertained facts may indeed give rise to criminal liability contrary to the verdict in the first instance.

5.3 Overview of the Provisions Relevant to Serious Traffic Crime

Now an overview of the most important penal provisions relevant to serious traffic crime will be given.

In German criminal law, there only exist few offences that refer exclusively to road traffic. In this respect, the most important offences in the Criminal Code are: Section 142 (leaving a scene of an accident without cause), Section 316 (driving while under the influence of drink or drugs), Section 315c (endangering road traffic) and Section 315b (dangerous disruption of road traffic).

Section 142 Criminal Code (leaving a scene of an accident without cause) only aims at protecting the financial interests of the parties to the accident as to adjust the damage. It can therefore be specified as a property offence and cannot be regarded as a *serious* traffic violation.

Section 316 Criminal Code penalises driving while under the influence of alcohol or drugs:

> (1) Whosoever drives a vehicle in traffic (Sections 315 to 315d) although due to consumption of alcoholic beverages or other intoxicants he is not in a condition to drive the vehicle safely shall be liable to imprisonment of not more than one year or a fine unless the offence is punishable under Section 315a or 315c.
> (2) Whosoever commits the offence negligently shall also be liable under subsection (1) above.

Although there are no fixed levels of blood alcohol in the written criminal law, the highest criminal courts have established certain limits of BAC through case law. It is important to note that these limits are only rules of evidence to determine if the accused was unfit to drive or not. If it is proved that a driver of a motor vehicle had a BAC of 0.11% or more while driving, it is irrefutably supposed that he or she was unfit to drive (*absolute Fahruntüchtigkeit*).[20] With a BAC of at least 0.03% but less than 0.11%, the defendant's being unfit to drive is only assumed if

20 Federal Court of Justice 28 June 1990, BGHSt 37, 89.

there are further signs of evidence such as driving errors or other alcohol-related deficits (*relative Fahruntüchtigkeit*).[21] The offence of driving while under the influence of drink or drugs does not require actual damage or even real danger to be caused. It is therefore called an 'offence of abstract endangerment' (*abstraktes Gefährdungsdelikt*).

If the drink-driving (or any other specifically regulated gross violation of traffic rules) actually leads to a real endangerment of an object of protection,[22] Section 315c (endangering road traffic) comes into effect:

(1) Whosoever in road traffic
  1. drives a vehicle, although
  (a) due to consumption of alcoholic beverages or other intoxicants; or
  (b) due to mental or physical defects,
  he is not in a condition to drive the vehicle safely; or
  2. in gross violation of traffic regulations and carelessly
  (a) does not observe the right of way;
  (b) overtakes improperly or drives improperly in the process of overtaking;
  (c) improperly drives near pedestrian crossings;
  (d) drives too fast in places with poor visibility, at road crossings or junctions or railroad crossings;
  (e) fails to keep to the right-hand side of the road in places with poor visibility;
  (f) turns, drives backwards or contrary to the direction of traffic or attempts to do so on a highway or motorway; or
  (g) fails to make vehicles which have stopped or broken down recognisable at a sufficient distance although it is required for the safety of traffic
  and thereby endangers the life or limb of another person or property of significant value belonging to another shall be liable to imprisonment of not more than five years or a fine.
(2) In cases under subsection (1) No 1 above the attempt shall be punishable.
(3) Whosoever in cases under subsection (1) above
  1. negligently causes the danger; or
  2. acts negligently and negligently causes the danger,
  shall be liable to imprisonment of not more than two years or a fine.

Different from Section 316 Criminal Code, this offence requires an endangerment, but it does not need to result in any actual harm or damage. Therefore, Section 315c Criminal Code is a so-called 'offence of concrete endangerment' (*konkretes Gefährdungsdelikt*). If the endangering behaviour also results in injury or death of other road users, liability for causing bodily harm or homicide can be established alongside with the liability under Section 315c Criminal Code. Section 315c penalises endangering road traffic not only if committed intentionally [subsection (1)], but also if committed negligently [subsection (3)]. The term 'carelessly' in subsection (1) no. 2 refers to a selfish attitude that is required to

21 Higher Regional Court of Cologne 2 June 1989, NZV 1989, 357.

22 I.e. the life or limb of another person or property of significant value belonging to another.

establish liability for this specific intentional crime. Subsection (3) distinguishes between cases (no. 1) where the perpetrator acts intentionally with regard to the endangering behaviour (e.g. drink-driving) and negligently with regard to the concrete dangerous consequences for an object of protection (e.g. a near miss with potential harm for a pedestrian) and those cases (no. 2) where the perpetrator acts negligently with regard to both the endangering behaviour and the danger for a protected object. The liability for attempt under subsection (2) is relatively inefficient, since it requires the intent to act dangerously within traffic and to cause a concrete danger to a protected object which can be rarely proved in practice. But if the intent can be proved, it would suffice that the defendant has started the car while being drunk.

Similar to the aforementioned crime, Section 315b Criminal Code (dangerous disruption of road traffic)[23] is also an offence of concrete endangerment. Whereas the provision described before penalises causing danger *by driving* (such as disregarding traffic regulations while driving), it is punishable under Section 315b Criminal Code to dangerously interfere with road traffic *from the outside* (such as setting up obstacles). Section 315b Criminal Code, too, provides for a penalty up to five years' imprisonment if the offence is committed intentionally. Under certain aggravating circumstances the crime can be punished with up to ten years' imprisonment.

If somebody gets killed or injured in a traffic accident, the prosecutor must consider whether a charge of negligent or intentional homicide or causing bodily injury, respectively, is justified. In German criminal law there are no regulations that particularly penalise the causing of death or injury by dangerous driving. Instead, the general rules on homicide and causing bodily injury apply. How these regulations are interpreted by the highest German criminal courts will be discussed in the next section (5.4).

Before that, a quick light is shed on a peculiarity of the German Criminal Code: it contains a provision, namely Section 316a,[24] that specifically criminalises

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23 Section 315b Criminal Code:
(1) Whosoever interferes with the safety of road traffic by
1. destroying, damaging or removing facilities or vehicles;
2. setting up obstacles; or
3. undertaking a similar act of interference of equal dangerousness,
and thereby endangers the life or limb of another person or property of significant value belonging to another shall be liable to imprisonment not exceeding five years or a fine.
(2) The attempt shall be punishable.
(3) If the offender acts under the conditions of section 315(3) the penalty shall be imprisonment from one to ten years, in less serious cases imprisonment from six months to five years.
(4) Whosoever negligently causes the danger in cases under subsection (1) above shall be liable to imprisonment not exceeding three years or a fine.
(5) Whosoever acts negligently in cases under subsection (1) above and negligently causes the danger shall be liable to imprisonment not exceeding two years or a fine.

24 Section 316a Criminal Code:
(1) Whosoever for the purpose of committing a robbery [...], theft with use of force [...], or blackmail with use of force [...] commits an attack against the life or limb or the freedom of decision of the driver of a motor vehicle or a passenger and thereby exploits the particular conditions of road traffic shall be liable to imprisonment of not less than five years. [...]

an attack for the purpose of committing a robbery if the attack is directed against a car driver. This provision increases the penalty for the common offence of robbery, which entails a minimum sentence of one year's imprisonment, to a minimum sentence of five years' imprisonment. It traces back to a regulation enacted by the National Socialist government in 1938.[25] Today, most legal academics agree that Section 316a does not fit in the system of the existing criminal law. Its protective function remains unclear. As in legal practice it does more harm than good, the academics are right to call for its abolition. Although Section 316a Criminal Code is highly problematic, it will not be discussed in further detail, since it is, at its core, a property crime, not a traffic offence.

The Road Traffic Act does not only contain regulatory offences such as the above-mentioned Section 24a, it also includes some criminal offences. Driving without a licence (Section 21 Road Traffic Act), for example, can be punished by fine or imprisonment of up to one year. But these are minor offences and will therefore remain out of consideration.

With this brief overview in mind, I would now like to concentrate on two aspects: the intent to kill somebody by dangerous driving, and the requirements of liability for negligence in road traffic incidents.

5.4 Specifics of German Law Concerning Serious Traffic Offences

5.4.1 Conditional Intent to Kill in Cases of Very Dangerous Driving

Dangerous driving that leads to the death of other road users or to the danger of such a result may give rise to charges of intentional homicide or attempt thereof.

In German criminal law, there are different types of intentional homicide. The first, Section 212 Criminal Code, which can been translated as 'homicide' (*Totschlag*), requires the intentional killing of another person:

(1) Whosoever kills a person without being a murderer under Section 211 shall be convicted of homicide and be liable to imprisonment of not less than five years.
(2) In especially serious cases the penalty shall be imprisonment for life.

A second type of intentional homicide, Section 211 Criminal Code, can be translated as 'murder' (*Mord*). In addition to the voluntary killing of another person, it requires at least one of nine special elements. Murder is, without exception, punished by lifetime imprisonment.

Section 211 Criminal Code
(1) Whosoever commits murder under the conditions of this provision shall be liable to imprisonment for life.

25 Act against street robbery committed with help of car traps (*Gesetz gegen Straßenraub mittels Autofallen*), 22 June 1938, RGBl. I, 651.

(2) A murderer under this provision is any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.

Both crimes call for intent. Although not explicitly provided for by law, German criminal courts and legal academics, as do the Dutch, recognise three degrees of intent: *dolus directus* of first degree, *dolus directus* of second degree and conditional intent. In cases of dangerous driving, as a rule, only conditional intent comes into question. But even conditional intent is rarely found to be proved by the German courts in such cases.

There exist several schools of thought as to how conditional intent should be defined. The most controversial issue is the question of whether conditional intent requires a volitional element in addition to the cognitive component of being aware of the risk of harmful consequences of one's conduct.[26] But the Federal Court of Justice and most academics agree that a volitional component, albeit a reduced one, is needed for establishing conditional intent. It is widely acknowledged that somebody acts with conditional intent if he or she recognises that there is a risk of causing the relevant result and yet accepts this risk or at least lives with it.[27]

In order to prove conditional intent to *kill* somebody, the Federal Court of Justice has developed a special rule of evidence. It assumes that humans generally have a high inhibition threshold for intentional lethal assaults. Therefore, the Federal Court of Justice holds that the objective dangerousness of an action for the life of others cannot suffice to infer intent. It may only be regarded as an indication of the defendant's *mens rea*. The court demands a close examination of all the circumstances in each individual case.[28] If there is evidence indicating that the defendant relied upon an assumption that the death would not occur, intent cannot be proved.

Referring to the inhibition threshold, the Federal Court of Justice has repeatedly overruled convictions for attempted homicide in cases where the defendants drove straight at a pedestrian giving a stop sign, even if the endangered person could only just save himself by jumping into the ditch.[29] Experience shows that most people endangered in this way protect themselves by quickly leaving the road, the court argues. Therefore, it considers that it is reasonable to suppose that offenders in these situations usually rely on the assumption that nothing fatal will happen. However, in a case where the victim turned her back on the offender

26 An overview of the different positions is presented in Roxin 2006, Section 12 margin no. 21 *et seq*. *See* Van Dijk, this book, Chapter 9 on the same issue in Dutch criminal law.

27 Settled case law, *see* for example Federal Court of Justice 22 April 1955, BGHSt 7, 363; Federal Court of Justice 4 November 1988, BGHSt 36, 1.

28 Recently again, Federal Court of Justice 22 March 2012, NJW 2012, 1524.

29 Federal Court of Justice 26 March 1992, StV 1992, 420; Federal Court of Justice 27 November 1975, VRS 50, 94; Federal Court of Justice 7 June 1983, NStZ 1983, 407; Federal Court of Justice 23 June 1983, NStZ 1984, 19.

who was driving directly at her and running her over, the Federal Court of Justice upheld the conviction of attempted murder.[30]

At times, the threshold rule seems to yield peculiar results. In 1987, the Federal Court of Justice approved a verdict of the Regional Court of Darmstadt which had rejected a conviction of attempted homicide.[31] The defendant, a farmer driving a tractor, had collided with a motorcyclist. The motorcyclist fell and got stuck under his vehicle. Because he was upset about day-trippers interfering with his harvest, the farmer purposely drove his tractor over the motorcycle, which crushed the victim's ribs and caused serious internal injuries. The Federal Court of Justice upheld the first instance verdict with the argument – and I quote – "it might be possible that the defendant believed that the victim would not be killed and therefore did not have the intention to kill". In my opinion, these short remarks cannot suffice to reject a claim of intent if the behaviour has been life-threatening in such a way.

The threshold rule can be regarded as fairly influential in German criminal jurisprudence. Generally, the Federal Court of Justice and the lower courts following its interpretation are rather reluctant to establish intent to kill. Nevertheless, the Federal Court of Justice recently clarified that this rule must not be mistaken as an empty phrase[32] – as the court had itself done in the farmer's case, one might add. In this new case, the Federal Court of Justice quashed a verdict of a Regional Court which had acquitted the defendant of intentional homicide although he had stabbed the victim with a long knife in the back, causing injuries dangerous to life. The Federal Court of Justice argued that a mere reference to the rule of the high inhibition threshold cannot replace a thorough examination of the circumstances relevant for proving intent. This restriction on the threshold rule can also be expected to apply to future traffic crime cases.

The threshold rule, by and large, corresponds with the ruling of the Dutch Supreme Court in the Porsche case.[33] The Federal Court of Justice, too, would consider it an indication *against* an intent to kill other road users if a collision would have caused substantial danger to the defendant's own life. The analogy may best be shown based on a case decided by the Federal Court of Justice where the situation was reversed.[34] Disappointed about a failed reconciliation with his girlfriend, the defendant, driving his car, called his father to announce he had decided to kill himself. Shortly after that, he provoked a head-on collision with another vehicle. The three passengers of the oncoming car, by lucky chance, were only slightly injured. The Regional Court of Mainz acquitted the defendant insofar as the charge of attempted murder was concerned. This verdict was overruled by the Federal Court of Justice, which criticised the court of first instance for not

30 Federal Court of Justice 4 March 2004, NJW 2004, 1965.
31 Federal Court of Justice 23 July 1987, BeckRS 1987, 31100113.
32 Federal Court of Justice 22 March 2012, NJW 2012, 1524.
33 Dutch Supreme Court 15 October 1996, ECLI:NL:HR:1996:ZD0139. *See* Wolswijk, this book, Section 2.3.2; Van Dijk, this book, Chapter 9.
34 Federal Court of Justice 25 March 2010, NStZ 2010, 515.

substantiating how the defendant would have intended to kill himself without at least accepting the killing of the passengers of the car with which he collided.

In the case of the epileptic car driver described at the beginning, the Regional Court ruled that his behaviour was so grossly negligent that it was on the verge of intentional killing.[35] Nevertheless, the court declined to find him guilty of intentional homicide and, as we have seen, convicted him of negligent homicide.

5.4.2 Requirements for Negligent Homicide in the Context of Road Traffic

As far as negligence is concerned, the question arises: what are the requirements of liability for negligence in road traffic incidents, and where do its lower limits lie?

The German Criminal Code does not expressly regulate what is meant by the term 'negligence'. Section 222 Criminal Code simply stipulates that somebody who negligently causes the death of another person is punished by imprisonment of up to five years or by fine. Negligently causing bodily harm is punishable under Section 229 Criminal Code with penalties of imprisonment of not more than three years or fine. Even the General Part of the Criminal Code does not contain any further explanations.

Negligence remains a blurred concept. That is the reason why some academics think that liability for negligence does not comply with the constitutional principle of legal certainty and precision (*Bestimmtheitsgrundsatz*).[36] This rule is part of the above-mentioned principle of the legality of penal regulations laid down in Article 103, Section (2) German Basic Law as well as Section 1 Criminal Code.[37] The prevailing opinion, however, is that liability for negligence complies with the Basic Law since its requirements have been elaborated by case law.[38] What is commonly agreed is that negligence requires a violation of due diligence. With regard to traffic crime, any breach of the duties of care laid down in the road traffic regulations, even if caused by momentary inattention, may be the basis of liability for negligence.

This seems to be an insufficient limitation of the concept of negligence, but it is at least supplemented by the aspects of foreseeability and avoidability[39] and by the requirement of a 'functional causal relationship'.[40] If it cannot be foreseen that a certain action might cause harm, it seems clear that a person cannot be held liable for these harmful consequences. And even if the negative results of an action can be foreseen but cannot be avoided, it would again be unfair to hold a person liable.

35 Press release of the Regional Court of Hamburg, 5 June 2012.

36 *See also* for further references Duttge 2011, Section 15 margin no. 33; Colombi Ciacchi 2005, p. 13 *et seq*.

37 For further details and references *see* Schmitz 2011, Section 1 margin no. 23 *et seq*.

38 Settled case law of the Federal Constitutional Court. *See* lately Federal Constitutional Court 23 June 2010, NJW 2010, 3209.

39 *See* Fischer 2013, Section 15 margin no. 14 *et seq*. with further references.

40 This translation comes closest to what is meant by the German term 'Pflichtwidrigkeitszusammenhang'. It was therefore adopted from Bohlander 2009, p. 51.

In order to justify a conviction of negligent homicide, the breach of due diligence must lead to the death of another person. But mere physical causation is not enough. As indicated before, German legal doctrine recognises the prerequisite of a functional causal relationship between the violation of a legal duty and the actual results. If, for example, it is possible that the death of another road user would also have been caused by driving with due care, the defendant is not held liable for negligent homicide. In these circumstances, it cannot be proved that it was specifically the breach of duty that led to the negative outcome. In the leading case in this respect, the defendant, the driver of a lorry, ran over and killed a drunken cyclist when overtaking him.[41] The defendant did not maintain the necessary and prescribed distance between the lorry and the bicycle. However, the possibility that the lorry driver would have collided with the cyclist in the same way, even if he had abided by the traffic regulation, could not be excluded. Thus, it could not be proved that it was *specifically* the breach of duty that led to the collision. According to the *in dubio pro reo* rule, the defendant was not held liable for negligent homicide. But it remains subject to legal controversy whether this rule really applies to such cases.[42]

The concept of negligence has not only an objective, but also a subjective component. What is objectively expected from a diligent car driver is mostly laid out in the road traffic regulations. The subjective component of negligence refers to the question whether the defendant, given his or her mental and physical capabilities, could have met these objective standards. As is true within the Dutch jurisdiction, German courts only deny negligence for lack of the subjective component in the very rare cases of physical or mental disabilities. For example, criminal liability would have been denied if the driver in the Eppendorf case had not known of his epilepsy before and had been hit by a seizure out of the blue. In that case, he could not have met the objective standards due to his physical disability.

In the case of the epileptic car driver, one might argue that he could not have acted differently in the situation of the accident, since the epileptic seizure abruptly made him lose control over his vehicle. In that specific moment, the accident was not avoidable for him. But one has to take into account that he knew of his illness and had experienced its consequences before. Therefore, negligence can be established on the grounds of his previous endangering behaviour, i.e. his decision to drive a car knowing that he was unfit to do so.

Although negligent homicide is punishable by imprisonment of up to five years, German criminal courts in practice tend to impose only fines. The reason is that many people accused of negligent homicide in road traffic experience profound sorrow for the victims and/or suffer from injuries themselves. However, if the defendant is proved guilty of drink-driving that has led to the deaths of others, the penalty is often imprisonment, in very serious cases even without probation.

In the light of this, it becomes apparent that the sentence in the Eppendorf case (three and a half years without probation) is relatively harsh.

41 Federal Court of Justice 25 September 1957, BGHSt 11, 1.

42 For further details *see* Roxin 2006, Section 11 margin no. 88 *et seq*.

5.5 Conclusions

Finally, I want to draw some conclusions.

In contrast to other European countries such as the Netherlands, where the criminal road traffic law has been considerably extended over the last few years, German traffic law shows a different picture: the most important provisions regarding serious traffic crime have not been changed in decades.[43] One might even say it is one of the few fields of German criminal law not subject to any demands for expanding scope or sanctions whatsoever. The reason for this might be that the provisions are sufficient to meet the needs of the jurisprudence and public opinion in judging serious traffic violations.

Dutch criminal law has also been reported to show a significant gap between high penalties for causing serious consequences (even in cases of low culpability) and low penalties for highly dangerous behaviour that only by lucky chance does not lead to any harm.[44] In German law, this gap seems much smaller. Drink-driving, for instance, can, as we have seen, be punished by imprisonment of up to one year, even if it has not led to any danger, let alone any actual harm. And negligently endangering road traffic entails a punishment of up to two years' imprisonment, with the only prerequisite being that a situation of actual danger was caused. For negligent homicide, the maximum penalty provided is five years' imprisonment.[45]

Although, by and large, German criminal law appears to satisfactorily address serious traffic crimes, there still remain some difficulties. One problem the courts have to deal with is in assessing whether the facts justify a conviction of intentional or negligent behaviour. This difficulty arises because, in most cases, the court has no insight into the defendant's personal views and perceptions at the time of the incident. But this is not a peculiarity of traffic offences – it is true for almost any type of crime.

Moreover, it remains difficult to determine the right sentence for cases of negligence. If the violation of obligations is relatively minor but its results are disastrous, two principles of sentencing are in conflict: the idea of social rehabilitation and the aspect of general deterrence. Whereas a harsh sentence appears not to be required to reintegrate the defendant if he or she has no prior criminal record, it may seem necessary to impose a considerable punishment in order to demonstrate an effective reaction to the violation of protected legal interests.

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43 Content and structure of the traffic offences in the Criminal Code still correspond largely to what was regulated by the Second Road Safety Act (*Zweites Gesetz zur Sicherung des Straßenverkehrs*), 26 November 1964, BGBl. I, 921.

44 *See* Duker, this book, Chapter 7.

45 Apart from that, I think this gradation in criminal law for assessing dangerous behaviour that causes no harm and the same conduct that by chance produces serious results is much more striking in most other fields of liability for negligence. For example, if somebody inadvertently drops a massive garden pot onto a busy pavement below his or her balcony and, by lucky chance, nobody gets hit, he or she is guilty of nothing, not even a regulatory offence. If the pot by accident lethally hits a pedestrian, this may give rise to a conviction of negligent homicide with a maximum sentence of five years in prison. Therefore, this gap seems even more acceptable in traffic crime.

With regard to the threshold rule, I think that the reluctance in establishing an intent to kill in cases of traffic offences is justified. The majority of drivers are usually confident that nothing serious will happen, even if they are knowingly breaking traffic regulations. Otherwise, they would be consciously endangering their own lives. But that is not true for most drivers. Young and inexperienced drivers, in particular, often cannot realistically evaluate the danger they are posing to others and themselves by driving in a risky way.

To me, readily passing a verdict of intentional homicide in cases of dangerous driving displays dissatisfaction with the penalties provided for negligence crimes and a desire for a retributive sentence. But, in my opinion, it is not the function of offences requiring intent to satisfy such needs. If it cannot be proved that somebody has foreseen the risk of killing other people and has accepted this risk, the consequence has to remain clear: no intention can be established. To raise public awareness of the perils of road traffic is, instead, the task of politicians, educators and the media.

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Chapter 6

The Spanish Perspective on Traffic Offences: Tough on Danger, Soft on Harm, and Penal Populism

Manuel Cancio Meliá and Mariona Llobet Anglí[*]

6.1 Introduction

Spanish criminal law deals with road traffic offences mainly by means of 'endangerment crimes', contained in a chapter of their own in the Spanish Criminal Code (CC; Articles 379-385 *ter*).[1] These felonies have been reformulated in many aspects in the last years, especially by a specific reform that took place in 2007.[2] Besides introducing new offences and regulations, this reform was specifically designed to limit the discretion of the courts in interpreting the legal wording, since they were acquitting in many cases where there was not any concrete danger (only 'abstract danger' or potential danger) – it was a possible interpretation of the wording of the law, which was not specific about this issue.

This specific criminal law reform was part of a huge campaign led by the government then in office aiming at generating a social conscience of the risks involved in breaking traffic rules, and underlining the comparatively high accident rates in Spain. In this framework, also the administrative law norms related to sanctions in traffic cases were reformed, introducing the so-called 'licence by points'. However, little change took place in the organization of police units enforcing traffic law, criminal and administrative. Perhaps as a result of this policy (at least, as the political agents that put the reform forward claim), accident rates have experienced a pronounced drop – this fact seems well established.

In the following pages, we first provide a brief presentation of the Spanish criminal law regarding road traffic offences, including both endangerment crimes and offences resulting in death or injury (Section 6.2). Then, we will analyse the reorientation phenomenon regarding prevention in the field of road safety through the endangerment assumptions (Section 6.3). Finally, the text will conclude with a

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1 *See* the Annex at the end of this chapter for the official English translation of the specific felonies against road safety.

2 Law (*Ley Orgánica*, LO) 15/2007 of 30 November. *See* on the political background of the reform, Pipaón Pulido, Pedreño Navarro & Bal Francés 2009, p. 13 *et seq.*; Rodríguez León 2008.

brief assessment of the criminal law policy that has been followed in the development of Spanish criminal traffic law (Section 6.4).

6.2 Basic Elements of Substantive Criminal Law: Traffic Offences under Spanish Law

As noted before, the occurrence of traffic accidents is not only fought in Spain using administrative law, punishing drivers who do not respect the rules in the Driving Code and its Regulations.[3] The Criminal Code also includes a specific chapter, which bears the label 'felonies against road safety' within the more generic title dedicated to 'felonies against collective safety'.

6.2.1 Endangerment Offences

The legal interest (*Rechtsgut*; *bien jurídico*) protected by Articles 379 to 385 *ter* CC is 'traffic safety', as a precondition for the protection of life and physical integrity of individuals.[4] Therefore, indirectly the objective of the regulation is to safeguard individual legal interests. Consequently, the corresponding precepts refer to endangerment offences regarding life and physical integrity. That is, they punish dangerous behaviours for road traffic, even if in the particular case there have not been any injuries to any of its participants.

Specifically, driving at excessive speed, driving under the influence of alcohol or drugs, reckless driving with or without disregard for the lives of others and driving without a licence or permit are punished. In addition, the law defines two other counts where the actual use of a motor vehicle or moped is not required: the refusal to submit to testing for alcohol or drugs and placing obstacles on the road (by act or omission). With regard to the subjective aspect, wilful commission is always required. It is to be noted that this intent refers to the dangerous action; not to possible harmful outcomes. Negligence is not punishable.

The offence of *driving at excessive speed* (Article 379.1) punishes whoever surpasses by 60 km/h in an urban road or 80 km/h in a non-urban road the maximum speed permitted by regulations. The penalty is imprisonment for three to six months, a fine, or community service, and in any case, the deprivation of the right to drive motor vehicles and mopeds.

This concerns, therefore, a crime of abstract danger: it is enough simply to drive in the circumstances described. The precept contains the *irrefutable* presumption, based on statistical data, that driving exceeding such speed limits is dangerous *per se*.

3 *See* RDL 339/1990 of 2 March, approving the Articles of the Law on Traffic, Motor Vehicle Traffic and Road Safety (*Código de Circulación*; CCIR), and RD 1428/2003, which approves the Ordinance of Circulation (*Reglamento General de Circulación*; RGC).

4 *See*, for example, Alastuey Dobón & Escuchuri Aisa 2011, p. 14 *et seq.*; Molina Fernández 2011, pp. 1339-1340; Montaner Fernández 2011, p. 288.

Thus, we must refer to the administrative regulation on the matter to differentiate between an administrative and a criminal offence. Speeding cases that fall below the 60 km/h or 80 km/h threshold (depending on the type of road) will be punished by administrative law. For example, in Spain, the general speed limit on a highway is set at 120 km/h; it will therefore be a felony to drive above 200 km/h (201 km/h or more). On the other hand, it constitutes an administrative offence to drive between 121 and 200 km/h.

The offence of *driving under the influence of alcohol or drugs* (Article 379.2) includes two kinds of commission: first, driving under the influence of such substances; and second, driving surpassing an exhaled alcohol level of 0.60 mgs/l, or a blood alcohol level over 1.2 gs/l.

This is one of the offences with the highest number of convictions (over 70,000 in 2012),[5] almost all due to driving under the influence of alcohol. On the other hand, there are few convictions for driving under the influence of drugs, although some cases have been initiated.[6] The drug tests are generally assigned to administrative proceedings and a smaller percentage to criminal proceedings.[7]

The general administrative limits established by Article 20.1 RGC are: 0.5 gs/l blood alcohol level or 0.25 mgs/l breath alcohol level.[8] Therefore, we must differentiate the crime from the administrative offence.[9]

First, for being a felony, driving has to be carried out "under the influence" of such substances (first part of Article 379.2). It is therefore the unanimous doctrine of both the Supreme Court[10] and the Constitutional Court[11] that their consumption undermines the psychophysical ability necessary for driving. Consequently, if a driver exceeds the limits permitted administratively but this does not affect his driving ability, it is not a criminal but an administrative offence. On the other hand, then, proof of an alcohol level (exceeding the administrative limits) is not essential to convict for the criminal offence.[12]

Therefore, to determine the influence of alcohol during driving, the courts consider relevant, along with the breath test results, other evidence such as the testimony of people who have witnessed the manner in which the driver drove

5 Attorney General's Report, 2012.

6 Montaner Fernández 2011, p. 295. In the case of drug use, there are difficulties of proof as there is no method of detecting these substances comparable to the breathalyser, so medical personnel should perform a blood or urine test. In recent years, however, the police have started using other detection methods consisting of a saliva sample.

7 Attorney General's Report, 2012.

8 The limit set is lower in special cases, such as driving vehicles involved in public or emergency service, dangerous materials, etc.

9 *See* Miró Llinares 2010, p. 180 *et seq.*; *cf.* the extensive analysis of Alastuey Dobón & Escuchuri Aisa 2011, p. 16 *et seq.*

10 Supreme Court 15 April 2002, no. 636. At the present time, there is not an official publication on paper of the Spanish court judgments. Hence, we must go to the available databases: either the Judicial Documentation Centre, an agency of the Supreme Judicial Council (<www.poderjudicial.es/search/>), or the various commercial databases, among which the most used is the Aranzadi/Westlaw database.

11 Constitutional Court 26 February 2007, no. 43.

12 Constitutional Court 19 April 2004, no. 68.

or behaved, particularly the law-enforcement officers who have issued the corresponding police report. So, if there is evidence of dangerous manoeuvres or the existence of an accident, and there is also a higher degree of alcoholic influence than allowed, the chances of conviction are very high.[13] However, if there is only proof of the former – abnormal manoeuvres or an accident – it is still possible to convict. This might occur when the subject has refused to take the test, when it was impossible to administer the test, when the test was positive but below the limit, or even when the test was not positive at all.

The matter of so-called preventive controls is more complex: those in which no anomalous manoeuvres are observed, but the driver is nevertheless required to perform a breath test. In these cases, in practice, the statement made by the traffic officers – as detailed as possible – in the report of the driver's symptoms is very important for the eventual conviction. The more details are included by the intervening officers (e.g. the driver's alcohol breath odour, his speech, his difficulty maintaining verticality or coordinating his movements, etc.), the more evidence there is to support the assertion that substance abuse has adversely affected the driving to the point of it becoming dangerous.

In summary, a crime might exist even without exceeding the administrative rate and may not exist despite it being exceeded. The reason is that the following elements *may* also be taken into consideration to establish 'driving under influence': the existence of an accident, the violation of traffic regulations and/or the physical appearance of the driver.

The matter becomes more complicated with regard to driving under the influence of drugs. The legislation does not set a level of consumption that serves as a limit on the existence of an administrative offence. Article 27 RGC simply states that drivers commit a very serious offence when they have introduced into their body drugs or other similar substances. Therefore, in this case, we must prove that drug consumption has indeed affected driving ability.

Second (Article 379.2 *in fine*), in any case a crime will take place, rather than an administrative offence, when certain rates of alcohol are identified (more than 0.60 mgs/l exhaled or 1.2 gs/l in blood). It is therefore an *irrefutable* presumption of influence, that is, from this level on the inability to drive is presumed. In this case, according to the main jurisprudence precedent, the breath test is sufficient evidence for conviction of the crime of drink-driving, without requiring any other check.[14] Because of this, the courts take into account the margin of error of ethyl-meters, which is discounted from the result given by them, to establish whether or not the limits have been exceeded.[15]

In short, the line between criminal and administrative law is established, based on the rules that govern this matter, as interpreted by the courts, with the following criteria:

13 Montaner Fernández 2011, p. 294.

14 *Cf.* Molina Fernández 2011, p. 1352.

15 The reference is the Ministerial Order 370/2006 of 22 November, which regulates the state metrological control of measuring instruments' intended alcohol concentration in exhaled air.

- Above 0.60 mgs/l or 1.2 gs/l: a criminal offence always takes place.
- Between 0.25 mgs/l or 0.5 gs/l and 0.60 mgs/l or 1.2 gs/l: a criminal offence occurs if the intake influences driving, and it is regarded as an administrative offence in the opposite case.
- Less than 0.25 mgs/l, or 0.5 gs/l: there can never be an administrative offence. That said, it is possible to apply the criminal offence, despite these rates not being surpassed, when there are other indications of substance intake that would negatively affect driving.[16]

The *reckless driving* offence (Article 380) punishes those who drive recklessly, if the life or integrity of persons has been put in danger. The penalty is imprisonment of six months to two years and the deprivation of the right to drive motor vehicles and mopeds. Since reckless driving is also sanctioned by administrative law, the element that determines the boundary between the criminal and administrative offence is the existence of a concrete danger.

According to the Supreme Court,[17] such recklessness represents a notorious disregard for traffic safety standards as understood by an average citizen. Being an indeterminate concept, it is difficult to define. That is why the second part of Article 380 states that it will be deemed 'manifestly reckless' to drive in excess of 80 km/h above the maximum speed in non-urban roads, and in excess of 60 km/h above the maximum speed in urban roads, and with a blood alcohol level greater than 1.2 gs/l or an exhaled alcohol level greater than 0.60 mgs/l. Thus, the occurrence of the elements listed under Article 379 is an *irrefutable* presumption of reckless driving.

The crime of *reckless driving with manifest disregard for the lives of others* (Article 381) is the harshest count among road safety infractions. The doctrine often refers to this offence as 'suicidal or homicidal driving'. It dates to the late 1980s, and was created in response to the behaviour of subjects who, in the context of betting, drove on the highway in the opposite direction.[18] Therefore, it is a specifically criminalized type of attempted murder, due to the reluctance of the courts to apply the general rules of attempt to commit a crime (Article 16 CC) when a specifically strong recklessness (which is identified in the doctrine with the classical *dolus eventualis*) occurs with the result of bodily harm. This offence is a specific exception to the general Spanish system about 'attempt': the general provisions and the interpretation of the courts require – in order to punish an attempted offence – a specific representation in the offender's mind of the harmful result as a possible outcome of his action. Therefore, reckless behaviour per definition does not allow a conviction for attempted homicide according to the general system.

However, this specific criminalization has not been followed by a strong prosecution of such conduct. The practical application of this count is low com-

16 Rightly critical of this view, Molina Fernández 2011, p. 1350, who states: "for reasons of legal certainty, an alcohol level below the administrative limit (if not accompanied by other substances) should not lead to a charge".

17 Supreme Court 8 October 2004, no. 2012.

18 Montaner Fernández 2011, p. 298.

pared with other road safety offences and this is the traffic violation with fewest convictions.[19] However, in recent years, a higher level of police investigations and court efficacy has been observed.[20]

All that being said, most commonly this article is applied in response to driving in the opposite direction of travel. Apart from these scenarios, it is also usual to apply it if the following behaviour is observed: driving through parking lots, driveways or sidewalks with pedestrians at excessive speed,[21] deliberately hitting other moving vehicles,[22] reckless overtaking on the road[23] or fleeing from the police by dangerous driving.[24]

The requirements to apply the count are threefold: (1) a 'manifest recklessness' in the sense described in the previous section; (2) a 'manifest disregard for others' lives' (according to the Supreme Court, this is a subjective state of indifference to the possible harm that might befall others while engaging in extraordinarily dangerous behaviour[25]); (3) the existence of either a concrete danger for the life or integrity of persons (Article 381.1; punished with imprisonment of two to five years, a fine and disqualification from driving) or an abstract danger (Article 381.2; punished with imprisonment of one to two years, a fine and disqualification from driving).

The offence of *refusal to submit to breath tests and drug screening* (Article 383) is the closing clause regarding driving under the influence of substances. To refuse to perform such tests is in itself a formal crime, which coincides exactly with the administrative offence[26] and whose constitutionality has been questioned for several reasons, among them, for infringement of the right not to testify against oneself or to confess guilt (Article 24.2 Spanish Constitution), and for establishing a disproportionate penalty. Indeed, the penalty associated with this felony is imprisonment of six months to one year (with deprivation of the right to drive). This penalty is higher than that established in Article 379.2, driving under the influence of substances, whose verification is protected by this article. However, its constitutionality has been expressly recognized in several rulings.[27]

The offence of *driving without a permit or licence* (Article 384) punishes anyone who drives without being authorized. This lack of authorization can be for three reasons: (1) loss of the permit or licence derived from the loss of points;[28]

19 About 170 of the more than 110,000 convictions in 2012 (*see* Attorney General's Report, 2012).

20 According to the Attorney General's Report, 2012, based on statistical data.

21 Supreme Court 26 January 2011, no. 8.

22 Valencia Court of Appeals 11 October 2012, no. 721.

23 Pontevedra Court of Appeals 20 April 2012, no. 149. For example, for not respecting the line (Navarra Court of Appeals 18 April 2011, no. 97).

24 Balearic Islands Court of Appeals 22 December 2011, no. 290.

25 17 November 2005, no. 1464.

26 It is important to note that the exact same behaviour can be sanctioned both administratively and criminally. However, the imposition of two sanctions is not possible, the criminal one having preference. The consequence is, then, that the administrative one will never be applied.

27 Constitutional Court 2 October 1997, no. 161. *See also* Constitutional Court 18 February 1988, no. 22.

28 *See* Law 17/2005, introducing a credit system that assigns points to each driver, which can be taken away if there is an infraction of the road regulations.

(2) precautionary or final removal of the driver's licence by court decision; (3) lack of permit or licence derived from not having ever obtained one.

This felony is again a formal offence or a simple disobedience, whose boundaries with the administrative offence are impossible to define.[29] Only in three borderline cases, the courts have opted for the application of the administrative offence: driving with expired, inadequate or foreign (not validated for use in Spanish territory) permits or licences.[30]

Finally, Article 385 punishes *other breaches of road safety* with imprisonment of six months to two years or a fine, and community service. The first part concerns placing unforeseeable obstacles on the roadway, spilling slippery or flammable substances, or altering signs (active behaviours). The second part concerns not re-establishing road safety when there is an obligation to do so (omission).

The precept states that such breaches have to create a serious risk to traffic circulation. Thus, this requirement is interpreted by the majority jurisprudential opinion as referring to a 'concrete danger', although the opposite solution (abstract danger) is also sustainable.[31]

6.2.2 Crimes with Concrete Results

Along with the offences mentioned above, there are, of course, the traditional felonies and misdemeanours of homicide and causing physical injuries, both as intentional and negligent acts. Articles 138, 147 *et seq*. and 617 CC envision the charge of intentional homicide and causing physical injuries. The first case is punishable by an imprisonment sentence of ten to fifteen years. It should be noted, however, that there has never been a conviction of such an intentional crime, or attempt thereof, unless pertaining to cases in which the vehicle is intentionally used as a weapon).[32] As stated before, the Spanish doctrine and case law pose strong requirements to the conviction as attempt: as in German doctrine and case law (which is followed in Spanish-speaking countries on this issue), in principle, it is necessary to prove the existence of a specific mental representation of the harmful result as a real possibility. The second case, causing physical injuries, ranges from three months to twelve years, according to the severity of the injury. It is even possible to apply a fine or permanent traceability (house arrest) in milder cases (e.g. injury consisting of a cervical contracture or a bruise).

The offences that are concerned with traffic harm are, however, general negligent crimes. Articles 142, 152 and 621.1 CC pertain to death and physical injuries caused by serious negligence. They are threatened with imprisonment of one to

29 This criticism is shared by all theorists. However, among practising lawyers there are those who rate the introduction of the offence a success. *Cf.* Salom Escribá 2008, p. 330.

30 Although in the latter case, there is a difference of opinion in the courts. So, again, the exact same behaviour is sanctioned administratively and criminally, the criminal one having preference, except in the three indicated cases, in which the administrative sanction will be applied according to the interpretation of the criminal courts.

31 *Cf.* Molina Fernández 2011, p. 1369.

32 Thus, for example, in the Supreme Court Decision of 18 February 2010, no. 218.

four years for death,[33] and three months to three years or a fine for causing bodily harm. Finally, the Criminal Code also penalizes slight negligence resulting in death (Article 621.2) or serious injury (Article 621.3) with a fine.[34] In all cases where negligence occurs, the sentence will include the deprivation of the right to drive motor vehicles and mopeds when the injuries have been caused during road traffic.

The difference between the two kinds of negligence resides, according to the case law, in that serious negligence involves the omission of the most basic diligence that is expected from anyone.[35] In contrast, slight negligence violates the standard of care that only a careful citizen would apply. Thus, for example, according to the casuistry of the courts in the traffic field, serious negligence would be: driving at high speeds; manoeuvres causing serious danger, such as overtaking or changing of direction; not respecting certain signs that represent an imperative mandate (stop, red lights, yield, crosswalk); seriously neglecting the mechanical maintenance of the vehicle (e.g. the braking system or the steering system); and driving while drowsy or under the influence of toxic materials. In addition, the concurrent circumstantial facts are of great importance, such as weather, traffic and roadway conditions.[36] In contrast, slight negligence includes: the invasion by a few inches of the opposite traffic lane,[37] performing sudden braking[38] or careless manoeuvres during reverse parking.[39]

In the event of any harmful outcome as a result of excessive speed, driving under the influence of substances or recklessness, the Judges or Courts of Law shall only consider the most seriously penalized felony, applying the punishment in its upper half (Article 382 CC). This crime will not always be one of result (as opposed to danger). For example, some types of reckless driving (Article 381 especially) are punished more harshly than physical injuries caused by negligence (Articles 152 and 620), and are even punished more harshly than the death caused by serious negligence (Article 142).

As can be seen in this brief reference to the relevant offences of unlawful killing and injuring in this area, there has not been – as opposed to what is usual in the laws of other countries – any modification of the 'traditional' regulation

33 When there is one fatality, and no crimes against road safety have been committed, homicide by negligence is usually punished with a custodial sentence of between twelve and eighteen months. This avoids the entry into prison under Article 80 *et seq.* CC, which provide for the replacement of imprisonment not exceeding two years by other measures (fine, etc.), as long as certain requirements are met. However, there is an exception such as the Supreme Court decision of 26 October 2001, no. 1920, which imposed a penalty of four years.

34 If the behaviour is charged as slight negligence, the counts that are charged are misdemeanours, with different procedural treatment, and, above all, they are not subject to public prosecution. Misdemeanours penalized under Article 621 are only pursuable when reported by the person offended or his legal representative.

35 Supreme Court 25 April 2005, no. 537.

36 *Cf.* Bizkaia Court of Appeals 10 December 2009, no. 853.

37 Bizkaia Court of Appeals 10 December 2009, no. 853; Ourense Court of Appeals 30 December 2002, no. 159.

38 Tarragona Court of Appeals 18 December 2004, no. 23.

39 Castellón Court of Appeals 8 July 2010, no. 275.

specifically for the traffic sector: the general infractions of negligent harm still apply, with quite limited penalties when compared to the penalties to be imposed pursuant to the (new) endangerment crimes.

6.3 Reorientation towards Prevention and Control of the Courts' Interpretation: Abstract Danger and the Harm Principle

The most relevant problems that some of these offences pose to criminal law theory and the constitutional foundations of criminal law are those generated by the legislator's decision to use criminal sanctions in cases where there is not any concrete endangerment. This is problematic from the perspective of the harm principle. Traditionally, Spanish doctrine and case law have supported a strict interpretation of the harm principle (in its German form of 'harm or concrete endangerment to a personal legal interest').[40] Therefore, according to most scholars and court rulings, a criminal punishment for the setting of merely statistical or remote risks is held to be unconstitutional regarding criminal law (it would, however, be acceptable in administrative sanctions' law). The last reform, which includes cases of danger *presumption* (irrefutable presumption; *praesumptio iuris et de iure*), presses clearly in the direction of establishing merely 'formal' offences without any real risk suffered for personal interests, and challenges the harm principle as well as the difference between administrative and criminal law.[41]

In this sense, regarding crimes against road safety, we can observe the abrupt separation from traditional criminal law. In traditional criminal law, negligent crimes were considered unimportant and crimes of abstract danger (that protect collective or diffuse interests, among which traffic safety is included) were not included in the criminal law. However, since a relatively short time, criminal law has been focused on these matters, mainly due to two factors: first, technical, due to the appearance in our societies of risks introduced by the technological process, and second, of political origin, derived from the attribution of a social function to the State.[42]

Thus, negligent crimes and especially endangerment crimes or 'risk-creation crimes' have become more important. The development of the automotive industry in the second half of the last century has caused an increase in the number of deaths and injuries in road traffic; consequences that almost never can be attributed to the intention of the driver. Instead, the violation of duty of care standards, that is, negligence, is entirely attributable to the driver.[43] That said, negligence may only be punished when it produces a harmful result. Therefore, if this does not happen for random reasons, the behaviour goes unpunished even if it has resulted

40 On the differences between this doctrine of legal interests and the Anglo-Saxon harm principle, *see* Von Hirsch 2003, pp. 13-25.

41 Apart from eliminating the need to prove the 'influence' of alcohol on driving, making the standards of proof easier; Hortal Ibarra 2008, p. 155.

42 Mir Puig 2008, pp. 13-15.

43 Mir Puig 2008, p. 15.

in very dangerous driving. Also, negligence is characterized precisely because the driver was confident that he would not have any accident. So the threat of punishment cannot deter him from driving in a dangerous manner.[44] To do this, you have to directly prohibit such behaviour, which itself is characterized by the intent of the author, regardless of whether in the particular case an accident occurs or not: consequently, the crimes of danger are introduced.

Furthermore, from the perspective of the positive general prevention theories, the use of criminal law to punish risky behaviours in traffic reinforces the importance of road safety.[45] Thus, the negative connotations of such behaviour are ingrained profoundly in the social consciousness. With these felonies, ultimately ensuring the expectations of society regarding the feeling that conduct that clearly breaks driving rules has to be punished, the punishment is not left to the random production of a result, while the citizens are aware of the risks involved in driving.[46]

As is known, endangerment crimes or risk-creation crimes stand in opposition to 'harm crimes' and are characterized by punishing behaviour that is merely dangerous, regardless of how it affects individual legal assets. They lower standards for criminal liability, protecting collective or diffuse interests, such as traffic safety, in the context of social attitudes of zero tolerance towards road offenders.[47] Precisely, when risk factors are amenable to individualization, the law does not wait for the production of a harmful result to intervene (negligence), but criminalizes the mere infringement of the duty of care standards. This is how the endangerment crimes appear,[48] which can be of two types: abstract and concrete.

Crimes of abstract danger, defined as being of presumed risk, are characterized by punishing dangerous behaviour without requiring further result of danger.[49] The legislator assumes that certain kinds of behaviours are inherently intolerable and resolves to criminalize them regardless of whether, in the circumstances of the case, there was actually a situation of danger to others.

In contrast, the concrete endangerment crimes are characterized by the existence of a consequent result of danger. In Spain, both the Attorney General's

44 Mir Puig 2008, p. 16.

45 In a similar sense, Montaner Fernández 2009a, p. 224.

46 Gutiérrez Rodríguez *et al.* 2009, p. 26.

47 García Albero 2007, p. 2.

48 García Albero 2007, p. 10.

49 Note that the doctrine proposes a third category of crimes of danger, somewhere between the crimes of concrete and abstract danger: crimes of abstract-concrete nature. These are characterized by behaviours defined as suitable for producing certain results, beyond merely being considered statistically dangerous behaviours. Thus, the fundamental difference with the crimes of pure abstract danger is that while in these crimes the dangerous behaviour is implicit in their legal description, that is, the damaging ability of the behaviour is something that has been valued by the lawmaker and manifested itself through the definition, in crimes of abstract-concrete danger the incorporation of the normative elements that must be met for the behaviour to be considered criminal is for the judge to determine (*cf.* Montaner Fernández 2009b, p. 9). An example of an 'abstract-concrete danger' crime is in Article 379.2, first part: driving under the influence of substances, in which judges must establish that the consumption has affected driving ability.

Office[50] and the courts understand that such danger occurs when there is a contact, a proximity between the dangerous behaviour of the driver and legal rights of third persons, in the sense that these come into the driver's range. Therefore, when we note the presence of other vehicles, or even the existence of passengers inside the offending vehicle, the performance of dangerous behaviours is deemed to constitute a concrete danger. Only if the driver is alone and has not interacted or approached any vehicle – or, at least, this has not been demonstrated – the danger is abstract.

Since the reform introduced by Law 15/2007, as mentioned above, the offences that protect road safety are closer to the crimes of abstract than concrete danger.[51] Only the crime of reckless driving, as regulated in Article 380 CC, is punishable as being of concrete danger, since this provision requires that the life or integrity of persons is 'specifically endangered'. In all other cases (speeding, driving under the influence of substances and manifestly disregarding the life of others[52]), merely dangerous driving (based on statistical data) is a felony, thus pushing the function of criminal law as risk manager.[53]

That said, it can be seen how in the field of traffic offences the *ex post facto* form of protection of legal rights has been replaced by an *ex ante* intervention model consisting of preventive rules whose infraction is deemed a crime independently almost always of the concrete danger which is produced.[54] Thus, the harm principle is seriously questioned: there is an emergence of a 'law of security' at the expense of a repressive regulation of the injury to legal interests.[55]

However, there is still more. First, judicial discretion has been limited[56] through the use of *irrefutable* presumptions whose presence confirms the com-

50 *See* Enquiry (*Consulta*) 1/2006 of the Attorney General.

51 Gutiérrez Rodríguez *et al.* 2009, p. 32 *et seq.*

52 Although this offence (Article 381) carries a higher punishment if concrete danger occurs (compare numbers 1 and 2 of Article 381).

53 Montaner Fernández 2009a, p. 219.

54 García Albero 2007, p. 8.

55 García Albero 2007, p. 8.

56 Queralt Jiménez 2008, p. 67 claims that it is the "manifest intent" of this reform. The former Minister of Justice expressly stated that it was to reach that goal (Pipaón Pulido, Pedreño Navarro & Bal Francés 2009, p. 14 *et seq.*). The lawmaker, in the preamble to Law 15/2007, recognizes that it is *to bind* the interpretation of the courts, considered very lenient, adding that the legal reform occurs with the "objective of defining [...] more rigorously all crimes and traffic safety related road safety, preventing certain behaviours classified as reckless driving may not go unpunished". *See* García Albero 2007, pp. 7-15, who notes that it is perceived by various social agents as a "lack of commitment of the judiciary in the fight against road accidents" and a "cheapening of recklessness" (p. 7), so that the reform of the law would almost consist in "replacing judges by radars" (p. 15). González Cussac & Vidales Rodríguez 2008, p. 196 *et seq.* also establish that the response of the judiciary was "too light", a large tolerance for these offences compared with other areas. Rodríguez León 2008, p. 19 contains the statements of the Director General of Traffic at the time, stating: "We feel that the judicial system has locked itself within too many procedural technicalities and abstract arguments [...]." For his part, Miró Llinares 2010, p. 163 *et seq.* believes that the room for interpretation of the lower courts implies a larger space for the political aims of penal reform, and Ortiz de Urbina Gimeno 2011, p. 13 identifies the target of the law in restricting judicial interpretation.

mission of the typical behaviour, as the behaviour is regarded *per se*.[57] Thus, for example, it is a criminal offence to drive above certain speeds (Article 379.1 CC), or to drive while exceeding certain rates of alcohol (Article 379.2 CC). Note how the danger of life or integrity is not an element of the type that must be proved. The object of protection is the rule that establishes such limits,[58] which facilitates the proof of the commission of a criminal offence.[59] Statistics show that driving in these circumstances is dangerous and there is no more to say.

Nevertheless, the speed limit fixed by criminal law, for example 201 km/h in non-urban roads, does not add extra dangerousness in statistical terms. As highlighted by García Albero,[60] it is demonstrated that driving at high speed in general is a factor in the incidence of accidents, but not that driving with an excess of 80 km/h on a highway is the specific cause of many accidents. There is no material basis, in terms of danger, to select that particular behaviour and leave the rest to the field of administrative law. Therefore, "the determination of a typical threshold fulfils a purely communicative role, it is rather an expression of the need to formulate a social reproach to the 'speed', but not because that particular speed, presented as an icon, is inherently more dangerous than speeds barely below that limit".[61]

Similarly, the rules of Article 379.2 CC, according to which the excess of certain rates of alcohol is a criminal offence *per se*, implying that this level of impregnation goes from a means of testing a typical element – driving *under the influence* – to becoming the object of the test itself.[62] Moreover, the rate of 1.2 gs/l (in blood) is not an uncontroversial limit for which there is no doubt that every driver will be affected in his psychophysical powers.[63] This is, again, because of a legislative decision that communicates limits above which the dangers of drink-driving, although always reprehensible, are considered to meet the threshold of criminal relevance. And this, regardless of whether it in an exceptional case does not affect the driving ability of a subject with an out-of-the-ordinary resistance to alcohol.

Second, some crimes are configured as mere formal violations,[64] which do not even require the existence of *ex ante* or perceived danger. The clearest example of this technique is the mere driving without licence or permit, either because it has been lost, or because it was never obtained (Article 384 CC).[65] This offence is simply intended to safeguard the administrative order and the effectiveness of certain formalities that are considered essential to discipline and control the

57 García Albero 2007, p. 8.
58 The same, moreover, to what has been administratively prohibited; Queralt Jiménez 2008, p. 66 *et seq.*
59 García Albero 2007, p. 11.
60 García Albero 2007, p. 10.
61 García Albero 2007, pp. 11-12. Obviously, as this author points out, it is not only a traffic phenomenon, but it appears in every criminal law related to security.
62 García Albero 2007, p. 18.
63 The evidence shows that this limit is 1.5 gs/l: at 1.5‰ everybody is affected, based on experimental results (*cf.* Molina Fernández 2011, p. 1351).
64 Prieto González 2008, p. 267.
65 However, it should be noted that some authors have tried to give this precept a certain material content, describing it as a crime of danger (*cf.* García del Blanco 2009, p. 409 *et seq.*).

capabilities required for road traffic.[66] Certainly, not all cases of driving without permission surpass the allowed level of risk.[67] They are simple cases of disobedience in which danger does not matter. So, this offence is something different and, even, something worse than crimes of pure abstract danger in which a risk, at least, is presumed.

Finally, we must refer to the offence of refusal to submit to the legally established alcohol level tests, and the tests for the presence of toxic drugs, narcotics and psychotropic substances, whose *underlying purpose* is primarily functional.[68] Certainly, it is of little use to criminalize driving while exceeding certain rates of alcohol (Article 379.2 CC) if there is not a strengthening of the regulation as provided in Article 383 CC.[69] Thus, this kind of 'refusal crime' as set out in Article 383 CC – in the sense that this behaviour prevents the possibility of actually verifying the relevant alcohol level – is not an endangerment crime but a type of offence that warrants preventive efficacy of Article 379.2 CC.[70] It is conceived as a complementary criminal standard of some of the crimes against road safety and its aim is to control "the investigation activities" of certain forms of conduct.[71]

In conclusion, one can say that the shift of liability to an earlier stage, the objectification of the typical elements and the existence of mere formal violations are the three main features of the crimes against road safety in Spain. Consequently, there is a proximity of criminal law to the logic of punitive administrative law,[72] making it a mere reinforcement of that[73] and increasing the criminal control over permitted risk.

Given this broad deployment of norms in the field of endangerment, as has been noted above, it is noteworthy, also in contrast to other European jurisdictions, that there are no specific rules for traffic in those cases in which improper conduct leads to death or physical injury. As previously seen, in this context, the crucial point is that the negligence incurred is classified as 'serious' or 'slight'. It is an abstract matter which generates a significant degree of uncertainty. In the concrete field of traffic infringements, this uncertainty can lead to the situation in which events that present a very similar level of culpability are punished by very different penalties.

6.4 Conclusions: 'The Hen or the Egg' and Penal Populism

Turning to a brief review of the regulation that has been outlined before, the first thing that seems clear is that there are a number of specific rules of traffic that are not compatible with the requirements of the harm principle, being purely formal

66 Prieto González 2008, p. 265.
67 García del Blanco 2009, p. 414.
68 Martín Lorenzo 2009, p. 322.
69 Martín Lorenzo 2009, p. 324.
70 Martín Lorenzo 2009, p. 328.
71 Montaner Fernández 2009a, p. 226.
72 Montaner Fernández 2009a, p. 217.
73 Gutiérrez Rodríguez *et al.* 2009, p. 31.

– the clearest case is the offence of driving a motor vehicle without administrative permission for this (Article 384 CC).[74]

Moreover, as we have seen, first, in its attempt to control the interpretation of the courts when they acquit for lack of risk, the legislature has created standards that are evidently over-inclusive because they cover behaviour that does not involve risk – abstract or concrete.[75] On the other hand, however, the technique chosen in the two legal standards that ensure the *criminal* prosecution of some behaviours (in relation to a particular level of speeding and with a certain level of alcohol [Articles 379.1 and 2 and 380.2 CC]) can also lead to an under-inclusive result. Think, for example, of the case where the speeding occurs opposite a school (the subject drives at 85 km/h when the speed is limited to 30 km/h), which does not meet the standard in which recklessness can be automatically charged.

This attempt to control the courts and set a higher standard will fail, above all, because it must be expected that the literal interpretation of clauses designed to control the interpretation by the courts ends up consolidating a perception among the public according to which any behaviour *below* the fixed threshold for the specific penalty would not be criminally relevant at all. This is to say it is worrisome that the clauses end up setting the minimum level of criminal relevance – obviously reaching a completely opposite result than the one intended by the legislature.[76]

Finally, probably the greatest weakness of the regulation – which has not been reported widely enough in the doctrine – is that the new regulation does not affect what will almost certainly be the biggest problem perceived by the public as to the intervention of criminal law in terms of traffic: the failure (socially perceived) of a reaction when there has been a real injury. Indeed, as has been shown, the regulation applicable to negligent crimes has not changed, which leads to the avoidance of jail terms for most people who cause deaths by dangerous driving.[77] Contributing to this situation are several issues. First, the penalty limit of four years for any negligent homicide, and the usual practice that imprisonment not

74 And it is worth noting that it seems unlikely that the Constitutional Court (which in recent years has been on several occasions in a deadlock because of deep political divisions in relation to various territorial and political issues) will declare unconstitutional any of these offences merely due to the formal absence of harmfulness.

75 The lawmaker is aware of this situation (although he does not openly acknowledge it). The only modifications made to the regulation introduced by Law 15/2007 and by Law (LO) 5/2010, of June 22, have been directed precisely to smooth punitive consequences (Alastuey Dobón & Escuchuri Aisa 2011, p. 9). Thus, it has relaxed the sanctions to be imposed (in Articles 379 and 384 CC), giving more room to the penalty of community service, and, above all, introducing the clause of Article 385 *ter* CC, which allows the judge to lower the penalty very significantly in response to the 'lower risk' caused, and 'other circumstances of the case' (the lawmaker indicated this in the preamble of Law 5/2010, XXV, to cater to the 'principle of proportionality'). However, apart from generating a higher level of uncertainty as to the penalty, it seems a contradiction that the legislator leaves ample space for judges to fix the sentencing at the same time he restricts radically their ability to define the scope of the offences.

76 *See* Miró Llinares 2010, p. 165.

77 González Cussac & Vidales Rodriguez 2008, p. 197 considered it a "scandal" just before the entry into force of the reform.

exceeding two years be suspended or replaced by other non-custodial measures regarding people with no previous criminal record (Articles 80 *et seq.*, 88 CC). Second, the possibility to qualify the behaviour as slight negligence. And third, on the practical level, the role of some kind of lawyers in this type of cases who work for the insurance company, rather than for the victim or the perpetrator. Thus, they are uninterested in a criminal prosecution after an agreement between companies,[78] and they prefer a streamlined process should the behaviour qualify as a misdemeanour.[79]

In conclusion, the situation that can be defined, no doubt, as being responsible for the social demand of criminal sanctions *is not included at all* in the penal reform. A strict criminalization of causing of injuries and deaths as a result of improper conduct in traffic, which is what explains the use of the expression (following the French precedent) of "road violence",[80] has been over the last years at the centre of the demands of victims' associations[81] as well as the media attention (there has been in Spain for a few years a steady *body count* of victims of accidents in the media, this being encouraged by the government). However, the punishment for negligent crimes has not increased in the last reform. In short: the penal medicine is applied to the wrong limb.

Obviously, these regulation deficits are not free of charge: they generate costs. On the one hand, we should ask whether a regulation is adequate when it has generated huge amounts of criminal proceedings (almost a third of all processes!)[82] for a criminal justice system, such as the Spanish, which is already

78 In the Spanish criminal procedure, there is still the possibility of a private prosecution. On the one hand, there is the so-called 'popular prosecution' (*acusación popular*), since any citizen has the constitutional right to prosecute almost all criminal offences. On the other hand – and this is very important in these cases – every victim of an offence is entitled to prosecute the defendant (*acusación particular*) in parallel to the public prosecutor, and put forward a real accusation (not only regarding the civil compensation, but also demanding a conviction). *See* Cancio Meliá 2012, pp. 245-252. Therefore, even if the public prosecutor has the duty to put forward every single case where there is a criminal behaviour (there is no opportunity principle), in the real court life the 'energy' of the public prosecutor will be low if the victim does not exercise her right to prosecute.

79 This situation is facilitated by the fact that some victims (or some attorneys who work for the insurance company, rather than for the victim or the perpetrator) use their power to initiate the procedure in case of a misdemeanour (slight negligence) solely on the basis of compensation to get from the offender (*cf.* Corcoy Bidasolo 2008, p. 75 *et seq.*). Salom Escribá 2008, pp. 336, 345 *et seq.* believes that the solution lies in the public prosecution always pressing charges of serious negligence (crime). In any case, this implies that many cases in which the occurrence of negligence is unclear will be heard before court. Instead of this, the company will prefer to pay the compensation and try to avoid a judgment.

80 Used by the lawmaker in the presentation of the reform introduced by Law 15/2007, following the French lawmaker. *See also*, for example, the considerations of García Albero 2007, p. 2, also used by Campo 2008, p. 353 (representative of an association of victims) or Escribá Salom 2008, p. 338 (prosecutor).

81 For example, the emphasis placed by an association of victims of accidents at this point, Campo 2008, p. 351.

82 Although there are no reliable statistics on the number of processes, it can be concluded through various indirect sources (the number of indictments, the number of prisoners registered with the Ministry of Justice, and the prisoners convicted) that crimes against road safety have led to *a third* of all criminal proceedings during 2009, only two years after entry into force of Law

heavily overloaded. In this respect, it should be pointed out that the Spanish criminal procedure is based on the (procedural) legality principle, namely, the obligation of the prosecution to prosecute *all* criminal offences of which it is aware. In fact, one can say that the tying up of criminal law to the administrative regulation[83] relating to traffic offences will lead in the real court life to a selective prosecution of behaviours, due to the inadequacy of police forces intended for enforcement.[84] This cannot lead to anything but an erosion of criminal law, as the citizenry notes the existence of such selective prosecution. Moreover, as has been shown, there are obvious *regulatory costs* derived from such *administrationalization*[85] of criminal law, as it directly violates the harm principle and the proportionality principle.

On the other hand, it is not clear that all these costs are actually compensated with a significant effect, derived from specific criminal regulation, in the modification of inappropriate behaviour in traffic.[86] It seems clear that a significant reduction of traffic accidents in Spain in the last years is a fact.[87] But the question arises, as the Spanish proverb goes: which was first, the hen of a changed social standard related to traffic offences (especially related to drink-driving), or the egg of the different legal (and specifically criminal law) treatment of these offences? In fact, the reduction in the number of accidents and harmful results, with a halving of the number of people killed in road accidents, began several years before the introduction of the reform in 2007. Thus, it should have been considered if penal reform was necessary by assessing other factors that surely had had some effect in reducing the number of accidents. The introduction of the penalty point system in 2005, improvements in road infrastructure during those years (with a very noticeable construction activity), and the renovation of vehicles and social-normative change regarding inappropriate behaviour in traffic should have been assessed.[88] In this sense, one may think that this kind of criminal law intends to put the focus on the perpetrators of the offences only and not on these other factors, such as the

15/2007. It is clear, however, that a very low number of defendants end up going to prison (less than 1%). *Cf.* data and explanations in Ortiz de Urbina Gimeno 2011, p. 17 *et seq.*

83 Jiménez Queralt 2008, p. 63.

84 In this regard, due to the absence of comparable data, we can only speculate. It seems significant that according to a study by the European Road Federation and a foundation of an insurer, in 2004 in Spain 25.2 traffic offences were identified per 1,000 vehicles, whereas in the Netherlands 850 penalties for 1,000 vehicles were identified. This does not seem to be explained by a higher level of compliance by Spanish drivers, suggesting that the enforcement density must be significantly lower in Spain (*see* Perona 2008, p. 359).

85 *See* Alastuey Dobón & Escuchuri Aisa 2011, p. 10 *et seq.*; Trapero Barreales 2011, p. 21 *et seq.*, with further references to this view, common in legal literature.

86 *See* the analysis of Ortiz de Urbina Gimeno 2011, p. 22 *et seq.*

87 *Cf.* statistics on <www.dgt.es>. In any case, from 2000 to 2010 there has been a reduction by more than 50% of the number of deaths (from 4,706 to 2,130). *See* Ortiz de Urbina Gimeno 2011, p. 16. Expressed in the *ratio* of deaths per vehicle, it has gone from 378 deaths per million vehicles in 1990 to 184 in 2000 and 70 in 2008. *Cf.* Miró Llinares 2010, p. 149 *et seq.*

88 *Cf.*, for example, González Montoro 2008, p. 17 *et seq.*; Ortiz de Urbina Gimeno 2011, p. 26.

change of public morality in our model of society with its unrestricted motorized mobility.[89]

A critical review of the policies developed in the area of traffic offences suggests that we face an example of the kind of crime policy that uses criminal law for propaganda purposes,[90] analysed under the concept of 'symbolic criminal law' (as developed in Germany by Hassemer) or 'penal populism' (as used in the English-speaking area).[91] This is manifested by largely overstating the part played by the reform of criminal offences, by not sufficiently taking into account the practical costs (because of the high number of cases the courts face) and by neglecting the normative costs (because of the breaches of the harm principle) that such penal populism entails.

The Spanish legislator, in conclusion, jumped the train of social unrest for political gain in its reform of the regulation of traffic offences, generating a criminal regulation that may only be described as wrong and unfair.

Relevant Provisions in the Spanish Criminal Code*

BOOK II: Felonies and their penalties

TITLE I: On unlawful killing and its forms

Article 138
Whoever kills another shall be convicted of manslaughter, punishable with a sentence of imprisonment from ten to fifteen years.

Article 142
1. Whoever causes the death of another by serious negligence shall be convicted of manslaughter and punished with a sentence of imprisonment of one to four years.
2. When the manslaughter is committed using a motor vehicle, a moped or a firearm, the punishment shall also, and respectively, include deprivation of the right to drive motor vehicles and mopeds or deprivation of the right to own and carry weapons from one to six years.
3. When the manslaughter is committed due to professional negligence, the punishment of special barring from exercise of the profession, trade or cargo shall also be imposed, for a period of three to six years.

89 Regarding this social change, *see* considerations by García Albero 2007, p. 2 *et seq.*, elaborating on the theme of the 'risk society'. *Cf. also* Miró Llinares 2010, p. 148 *et seq.*; Trapero Barreales 2011, p. 20 *et seq.*

90 *See* the analysis of Miró Llinares 2010, p. 152 *et seq.*

91 Regarding these instruments of political-criminal analysis, *see* Cancio Meliá 2006, p. 345 *et seq.*

* Source of the translation: Spanish Ministry of Justice, available at: <www.mjusticia.gob.es/cs/Satellite/es/1288774502225/ListaPublicaciones.html?param1=1288775993122>. In Spanish criminal law, pecuniary sanctions usually are imposed with the so-called 'Scandinavian system', that is, according to the economic condition of the offender, a daily rate is defined, and this amount is multiplied by the months or days fixed according to the gravity of the offence.

BOOK II: Felonies and their penalties

TITLE III: On bodily harm

Article 147

1. Whoever, by any means or procedure, causes another an injury that detracts from his bodily integrity or his physical or mental health, shall be convicted of the offence of grievous bodily harm, with a sentence of imprisonment of six months to three years, whenever the injury objectively requires medical or surgical treatment for health purposes, in addition to qualified first aid. Simple qualified surveillance or monitoring of the course of the injury shall not be deemed medical treatment.
   Punishment by the same penalty shall be applied to whoever, within the term of one year, has perpetrated the action described in Article 617 of this Code four times.
2. However, the act described in the preceding Section shall be punished with a sentence of imprisonment of three to six months or a fine from six to twelve months, when less serious, in view of the means used or the result caused.

Article 148

The injuries foreseen in Section 1 of the preceding Article may be punished with a sentence of imprisonment of two to five years, in view of the result caused or the risk produced:

1. If weapons, instruments, objects, means, methods or ways that are specifically dangerous to life or health, both physical and mental, of the injured party, were used;
2. If perpetrated with wanton cruelty and premeditation;
3. If the victim is under twelve years old or is incapacitated;
4. If the victim is or has been the wife, or woman bound to the offender by a similar emotional relation, even when not cohabitating;
5. If the victim is an especially vulnerable person who lives with the offender.

Article 149

1. Whoever causes to another person, by any means or procedure, to forfeit or lose the use of a major organ or limb, or a sense, or sexual impotence, sterility, serious deformity or to suffer a serious physical or mental illness, shall be punished with a sentence of imprisonment from six to twelve years.
2. Whoever causes to another person a genital mutilation in any form shall be punished with a sentence of imprisonment from six to twelve years. Should the victim be a minor or incapacitated, the punishment of special barring from exercise of parental rights, guardianship, care, safekeeping or fostership shall be applicable for a term from four to ten years, should the Judge deem it appropriate in the interest of the minor or incapacitated person.

Article 150

Whoever causes another person to forfeit or lose the use of a non-major or limb, or a deformity, shall be punished with a sentence of imprisonment from three to six years.

Article 152

1. Whoever causes any of the injuries foreseen in the preceding Articles due to serious negligence shall be punished:
   1. With a sentence of imprisonment from three to six months, in the case of the injuries described in Article 147.1;
   2. With a sentence of imprisonment of one to three years, in the case of the injuries described in Article 149;
   3. With a sentence of imprisonment of six months to two years, in the case of the injuries in Article 150.
2. When the acts referred to in this Article have been committed using a motor vehicle, moped or firearm, the punishment of deprivation of the right to drive motor vehicles and mopeds or the right to own and carry weapons for a term of one to four years, respectively, shall also be imposed.
3. When the injuries are committed due to professional negligence, the punishment of special barring from practice of the profession, trade or office shall also be applied, for a term from one to four years.

BOOK II: Felonies and their penalties

TITLE XVII: On felonies against collective safety

CHAPTER IV: On felonies against road safety**

Article 379

1. Whoever drives a motor vehicle or a moped at a speed that exceeds the speed permitted by law by sixty kilometres per hour in urban streets, or by eighty kilometres per hour on non-urban roads, shall be punished with a sentence of imprisonment from three to six months, or with that of a fine from six to twelve months, or with that of community service from thirty one to ninety days, and, in all cases, with that of deprivation of the right to drive motor vehicles and mopeds for a term exceeding one and up to four years.
2. The same penalties shall be applied to whoever drives a motor vehicle or moped under the influence of toxic drugs, narcotics, psychotropic substances or alcoholic beverages. In all cases, whoever drives with a rate of alcohol in expired air exceeding 0.60 milligrams per litre, or a rate of alcohol in the blood exceeding 1.2 grams per litre, shall be sentenced to those penalties.

Article 380

1. Whoever drives a motor vehicle or a moped with manifest recklessness and specifically endangers the life or integrity of persons shall be punished with imprisonment of six months to two years and deprivation of the right to drive motor vehicles and mopeds for a term exceeding one and up to six years.

** Articles 379, 380.2, 384, 385 *bis* and 385 *ter* were not included in the original draft of the Spanish Criminal Code (1995).

2. For the purposes this provision, driving under the circumstances foreseen in Section 1 and in the second sentence of Section 2 of the preceding Article shall be deemed manifestly reckless.

Article 381

1. Punishment by imprisonment from two to five years, a fine of twelve to twenty-four months and deprivation of the right to drive motor vehicles and mopeds during a period from six to ten years shall be handed down to whoever, manifestly disregarding the life of others, behaves as described in the preceding Article.
2. When the life or integrity of persons has not been specifically placed in danger, the penalties shall be of imprisonment from one to two years, a fine from six to twelve months and deprivation of the right to drive motor vehicles and mopeds for the term foreseen in the preceding Section.

Article 382

When through the acts penalised in Articles 379, 380 and 381, the doer were to cause, in addition to the risk prevented, a result amounting to a felony, whatever its seriousness, the Judges or Courts of Law shall only consider the most seriously penalised felony, applying the punishment in its upper half and, in all cases, ordering compensation of the civil liability that has been incurred.

Article 383

The driver who, when required to by a law-enforcement officer, refuses to submit to the legally established alcohol level tests, and those for the presence of toxic drugs, narcotics and psychotropic substances referred to in the preceding Articles, shall be punished with imprisonment of six months to one year and deprivation of the right to drive motor vehicles and mopeds for a term exceeding one and up to four years.

Article 384

Whoever drives a motor vehicle or moped in the cases loss of validity of his driving license or permit due to loss of all the points legally assigned, shall be punished with a sentence of imprisonment from three to six months, or with that of a fine from twelve to twenty-four months, or with that of community service of thirty one to ninety days.

The same punishment shall be imposed on whoever drives after precautionary or final removal of his driving license or permit by court decision, and whoever drives a motor vehicle or moped without ever having obtained a driving license or permit.

Article 385

Whoever causes a serious risk to traffic in any of the following manners shall be punished with a sentence of imprisonment of six months to two years or a fine of twelve to twenty-four months and community service from ten to forty days:

1. Placing unforeseeable obstacles on the roadway, spilling slippery or flammable substances or changing, stealing or cancelling out signs or by any other means;
2. Not re-establishing road safety when obliged to do so.

Article 385 *bis*
The motor vehicle or moped used in the acts foreseen in this Chapter shall be deemed an instrument of the offence for the purposes of Articles 127 and 128.

Article 385 *ter*
In the felonies foreseen in Articles 379, 383, 384 and 385, the Judge or Court of Law, may hand down a reasoned judgement that may lower a sentence of imprisonment by one degree in view of the lower extent of the risk caused and the other circumstances of fact.

BOOK III: On misdemeanours and their penalties

TITLE I: Misdemeanours against persons

Article 621
1. Those who due to serious negligence were to cause any of the injuries foreseen in Section 2 of Article 147, shall be punished with the penalty of a fine from one to two months.
2. Those who, due to slight negligence, were to cause the death of another person, shall be punished with the penalty of a fine from one to two months.
3. Those who, due to slight negligence, cause an injury that would constitute a felony shall be punished with a punishment of a fine from ten to thirty days.
4. Should the act be committed with a motor vehicle or moped, he may also be sentenced the punishment of deprivation of the right to drive motor vehicles and mopeds for a term from three months to a year.
5. Should the act be committed with a weapon, he may also be sentenced to deprivation of the right to own and carry weapons for a term from three months to a year.
6. Misdemeanours penalised under this Article shall only be pursuable when reported by the person offended or his legal representative.

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Chapter 7

The Relation Between Culpability and Harm in Sentencing Traffic Offences in the Netherlands and England & Wales

*Marius Duker**

7.1 Introduction

A recurrent theme in traffic law is the relationship between endangerment offences and result offences. Endangerment offences are not usually considered serious offences, but even a minor traffic error may already constitute a serious offence if it results in a serious accident. Is the far more severe sentence justified by the gravity of the consequences or should the degree of culpability be the paramount consideration when assessing the severity of a traffic offence? This question affects issues such as the way in which traffic offences are interpreted. In the Netherlands, for example, the debate in literature has focused on interpreting the term 'negligence' with respect to causing traffic accidents and the apparent ease with which fatal accidents are classified under this heading.[1] The question also directly affects sentencing. This chapter focuses on the issue of sentencing rather than on the interpretation of traffic offences. Several authors in England & Wales have recently criticized the high penalties for fatal traffic accidents in cases where hardly any blame could be attached to the person responsible.[2] The question arises as to how the jurisdiction of England & Wales compares to a country such as the Netherlands: how do the two jurisdictions deal with the relationship between culpability and harm in sentencing for traffic offences, and is the punishment – and its standardization – proportionate to culpability and harm? This comparative analysis may also offer insights for greater standardization of penalties for traffic offences. By focusing on classical forms of punishment such as prison sentences, fines, community service orders[3] and disqualification, the enforcement of

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1 *See*, *e.g.*, Vellinga 2005, p. 175; Den Harder 2006, pp. 181-182; De Jong 2007. *See also* Duker 2012.

2 Hirst 2008; Cunningham 2008; Cunningham 2012. Specifically in connection with the required causal relationship between the illicit driving and the consequence, *see* Sullivan & Simester 2012. For an earlier discussion of England & Wales in Dutch literature, *see* Lensing 2003.

3 The usual categories of fines in England & Wales are subdivided into Band A (starting point: 50% of the offender's relevant weekly income, with a range of 25%-75%), Band B (100% of relevant

road safety will not receive the attention it deserves because, to a large extent, road safety is given substance in measures other than these classical forms of punishment. Examples of such measures include systems of penalty points whereby driving licences are automatically withdrawn under administrative law following a certain number of violations,[4] mandatory alcolock[5] programmes for offenders who have driven with a very high blood alcohol content or repeatedly have driven while under the influence, or educational measures designed to prevent drink-driving. These sorts of measures are discussed in brief because of their relevance to road safety,[6] but a sufficiently balanced comparison of how such measures operate in the Netherlands and England & Wales is beyond the scope of this chapter. My primary interest lies in obtaining insight into the relationship between dangerous driving and causing traffic accidents, and the penalties for these offences already provide sufficient insight in this respect. Theory building on punishment and research into the effectiveness of punishment are also disregarded here as there is no scope for a comprehensive discussion of their significance in the punishment of traffic offences.[7]

I will first discuss the most important endangerment offences and the corresponding penalties in the two jurisdictions and will subsequently compare them to the penalties for negligently causing serious traffic accidents. The penalties prescribed by law do not always reflect actual sentencing practice; sentencing guidelines ('guidelines') provide more insight. As one of the aims of this chapter is to promote these guidelines, I will discuss this specific standardization of penalties in more detail. I will end my comparative analysis by examining a few specific cases that briefly illustrate the differences between the Netherlands and England & Wales in practice and analyse any striking differences and similarities between the two jurisdictions. I will argue that the weight assigned to the conduct and the consequences in sentencing has not been consistently specified in the definitions of the various traffic offences and the corresponding maximum penalties in either jurisdiction. In addition, I will argue that both jurisdictions, and particularly England & Wales, seem to make a disproportionate difference between the punishment handed out for endangerment offences and that given for result offences. Based on these two general observations, I make suggestions as to how the weight of the conduct and the consequences could be laid down consistently in the definitions of the offences, and how standardization of penalties could estab-

weekly income) and Band C (150% of relevant weekly income). In addition to the various categories of fines, community service orders are also subdivided in 3 categories: low level, medium level and high level. In terms of unpaid work, these categories equate to 40-80 hours of work, 80-150 hours of work and 150-300 hours of work respectively (Magistrates' Court Sentencing Guidelines, Definitive guideline, May 2008, pp. 148-150, 155 and 161).

4 *See*, *e.g.*, Article 123b WVW 1994 (the Dutch Road Traffic Act). On this subject, *see* Kessler 2008.

5 An alcolock is an administrative measure that prevents a car from starting if the driver is above the drink-drive limit.

6 *See* on this the fact sheets by the SWOV Institute for Road Safety Research. *See*, in particular, the fact sheets 'Penalties in traffic', 'Alcolock', 'Rehabilitation courses for road users' and 'Demerit points systems'. The fact sheets are available at: <www.swov.nl/UK/Research/factsheets.htm>.

7 *See, e.g.*, Cunningham 2008; Van Dijk 2008.

lish a balance between the considerable harm caused by the dangerous driving on the one hand and the degree of the road user's culpability on the other hand. Although this last question is particularly difficult to answer and requires further consideration of the effects of various penalties and measures, the suggestions may contribute to the debate on this important theme. Finally, I would like to note that Sally Cunningham's research was an important source for my modest research into English law, while I was also guided by her deliberations on various important aspects.

7.2 Comparing the Relevant Offences

7.2.1 Endangerment Offences

Dutch law provides for one general endangerment offence, i.e. Article 5 of the *Wegenverkeerswet 1994* (Road Traffic Act 1994; hereafter: WVW 1994), which states that anyone is forbidden to behave in such a way that danger on the road is caused or can be caused or that the traffic on the road is hindered or can be hindered ('endangering traffic'). This offence is a misdemeanour rather than a felony, and thus a relatively minor offence. Proof of *mens rea* is not required.[8] The offence carries a maximum prison term of 2 months and a maximum fine of 3,900 euros.[9] If convicted, the driver may be disqualified from driving for up to 2 years, and for up to 4 years if a previous disqualification, imposed as a final sentence, expired less than 2 years previously.[10] The definition of the offence of endangering traffic is very broad as it makes no distinction between reckless traffic offenders and road users who create a dangerous situation as a result of momentary inattention. Hence, a broad range of dangerous traffic behaviour is covered.

In addition to this general prohibition, the *Reglement Verkeersregels en Verkeerstekens* (Road Traffic and Traffic Signals Regulations; hereafter: RVV) provides for more specific traffic regulations. The WVW 1994 stipulates that violating the RVV is considered an offence. Exceeding the speed limit, for instance, is a misdemeanour, carrying a maximum prison term of 2 months and disqualification for up to 2 years.[11] Many of these offences are dealt with under administrative law.[12] Nonetheless, specific traffic offences may be excluded and can therefore be dealt with under criminal law. These offences include driving without a licence, not keeping distance when driving at high speed and serious speeding offences. In these cases, however, an extrajudicial fine or a punishment order (a punish-

8 The defence 'absence of all culpability' may be invoked, however. *See* Wolswijk, this book, Section 2.3.1.

9 The law uses the term 'detention' (*hechtenis*) for imprisonment with respect to misdemeanours. Detention is seldom, however, imposed for misdemeanours.

10 Article 179, Sections 2 and 5 WVW 1994.

11 Article 92 RVV and Article 177, Section 1 under d WVW 1994.

12 In accordance with the *Wet administratiefrechtelijke handhaving verkeersovertredingen* (Traffic Regulations Administrative Enforcement Act). *See*, in particular, Article 2, Section 1 of this Act.

ment issued by the Public Prosecution Service) may also be imposed.[13] A criminal offence of a totally different order is drink-driving, which is punishable as a felony if the blood alcohol content ('BAC') is 0.05%[14] or higher, or 0.02% or higher for newly qualified drivers. This endangerment offence is considered to be far more serious than the other endangerment offences. In the Netherlands, drink-driving carries a maximum prison term of 3 months, both for newly qualified and other drivers.[15] An offender may also be disqualified from driving for up to 5 years, and in the event of recidivism for up to 10 years.[16] As discussed below, these periods of 5 and 10 years for drink-driving alone are the same as for the most serious forms of negligently causing death or serious injury by driving.

In contrast to the Netherlands, England & Wales recognizes two general endangerment offences: careless driving and the more serious offence of dangerous driving. The difference between careless driving and dangerous driving is that careless driving falls *below* what would be expected of a competent and careful driver, while dangerous driving falls *far below* what would be expected of a competent and careful driver.[17] Careless driving carries a maximum fine of 5,000 pounds and discretionary disqualification.[18] A prison term can, therefore, never be imposed. Dangerous driving also carries a maximum fine of 5,000 pounds, but also a maximum prison term of 2 years and mandatory disqualification for a minimum of 12 months.[19] Although the question of whether conduct was careless or dangerous may be debatable in some cases, the outcome of that debate is obviously extremely important. The maximum prison term of 2 years is also considerably higher than the 2 *months* for the Dutch offence of endangering traffic, while this latter offence also includes cases of reckless driving, which in England & Wales fall under dangerous driving.[20]

As in the Netherlands, there are other criminal offences in England & Wales in addition to these general endangerment offences that specifically concern the dangerous nature of the traffic behaviour and which may lead to prosecution, usually for the Magistrates' Court. One example is speeding, which carries a maximum

13 The statistics of traffic offences dealt with in court show that these offences are frequently treated as a violation of Article 5 WVW 1994, but even more often as a violation of other special traffic regulations. Data received in person from the Ministry of Justice's research and documentation centre (WODC) for 2008 and 2009.

14 As well as drink-driving, driving under the influence of other substances that may seriously impair the driving ability is also an offence (Article 8 WVW 1994).

15 Inducing an individual whom you know to be, or should know to be under the influence to drive a vehicle carries the same penalty.

16 Article 175 WVW 1994 and Article 179 under 1 and 4 WVW 1994.

17 Articles 2A and 3ZA Road Traffic Act 1988 (RTA 1988). On this subject, *see*, *e.g.*, Cunningham 2008, p. 48 *et seq.*

18 *See*, *e.g.*, Cunningham 2008, p. 35. The English 'disqualification' is essentially the same as the Dutch *ontzegging van de rijbevoegdheid*, in which case the driving licence is revoked (Article 146 Powers of Criminal Courts Sentencing Act 2000).

19 Section 34 Road Traffic Offenders Act (RTOA) 1988. *See*, *e.g.*, Cunningham 2008, p. 25.

20 The relatively low maximum punishment for the endangerment offence might explain why very dangerous behaviour that does not cause a serious result is quite often prosecuted for attempted intentional homicide in the Netherlands. *See*, Van Dijk, this book, Section 9.2.2.

fine of 2,500 pounds if the violation took place on a motorway, and discretionary disqualification. In most cases, however, fixed extrajudicial fines are imposed.[21] Drivers will be guilty of drink-driving if they have a BAC of 0.08% or higher, which is more liberal than in the Netherlands. This relatively high percentage of 0.08%, however, has attracted criticism.[22] Drink-driving carries a maximum prison term of 6 months, a maximum fine of 5,000 pounds and mandatory disqualification for a minimum of 12 months (or a minimum of 3 years in the event of recidivism).[23] This prison term is considerably lower than that for dangerous driving, and this raises the question of which forms of dangerous driving are considered more serious than drink-driving in England & Wales. The penalty in England & Wales for dangerous driving is vastly different to the maximum prison term of 2 months for dangerous driving in the Netherlands, whereas the penalties for drink-driving in the two jurisdictions are much more similar. The maximum term of disqualification in particular is relatively long in the Netherlands. With some reservation, it could be argued that the use of alcohol *relatively* increases the sentence in the Netherlands more than in England & Wales.

7.2.2 Causing Death or (Serious) Injury by Driving

Dangerous driving that causes a serious traffic accident constitutes a completely different offence. Article 6 of the Dutch WVW 1994 prohibits individuals from behaving in such a manner that a traffic accident, attributable to them, takes place in which another individual is killed or sustains grievous bodily injury, or sustains bodily injury resulting in an illness or that causes the other individual to be prevented from engaging in normal activity (i.e. negligently causing death or serious injury by driving or 'NCDD'). A minimum degree of culpability for the accident is required, which is described as 'significant carelessness'.[24] NCDD carries a maximum prison term of 3 years in the event of death and 18 months in the event of grievous bodily injury. In case of 'recklessness', which requires the defendant to have created a very serious danger by extremely negligent behaviour,[25] the maximum sentences are doubled. All mentioned maximum sentences can be increased by a further 50% if the road user was under the influence of alcohol, seriously exceeded the speed limit, drove too close to the other vehicle, failed to give way or performed a dangerous overtaking manoeuvre.[26] Causing a fatal traffic accident

21 *See*, *e.g.*, Cunningham 2008, pp. 79-80.

22 *See* Cunningham 2011. She notes that alcohol use is involved in 10% of all traffic accidents in England & Wales (*see* Cunningham 2008, p. 66).

23 *See* Section 5 RTA 1988 and Section 34 RTOA 1988. On this subject, *see*, *e.g.*, Cunningham 2008, pp. 60-65.

24 Supreme Court 1 June 2004, ECLI:NL:HR:2004:AO5822.

25 *See*, *e.g.*, Supreme Court 15 October 2013, ECLI:NL:HR:2013:959. The concept of recklessness under Dutch law is discussed extensively by Wolswijk, this book, Section 2.5.

26 Article 175, Sections 2 and 3 WVW 1994. The Supreme Court has ruled that the mere finding that the defendant has committed one or more of these acts does not, in general, suffice to establish recklessness. *See*, *e.g.*, Supreme Court 15 October 2013, ECLI:NL:HR:2013:959. *See also* Wolswijk, this book, Section 2.5.2.

by reckless driving whereby the road user failed to give way could thus result in a maximum prison term of 9 years.[27] In each case, disqualification for a maximum period of 5 years, or 10 years in the event of recidivism, may be imposed.[28]

The maximum penalties in England & Wales are much higher: causing death by dangerous driving ('CDDD') carries a maximum prison term of 14 years (by comparison, the mere offence of dangerous driving attracts a sentence of 2 years) and disqualification for a minimum of 2 years.[29] There is no provision in law for statutorily increasing the penalty for causing death by reckless driving,[30] which is also covered by CDDD. Drink-driving, too, does not result in a special qualification being added to the offence of CDDD. The law in England & Wales thus includes fewer aggravating circumstances. As demonstrated below, however, the guidelines in this jurisdiction do include such circumstances. Contrary to the Netherlands, causing *injury* by dangerous driving was for a long time not recognized as an offence, with the Court of Appeal previously considering this as an aggravating circumstance within the scope of a prosecution for dangerous driving. The maximum sentence of 2 years for dangerous driving, however, was frequently considered too low by the courts. This was one of the reasons why the specific offence of causing serious injury by dangerous driving was recently added to the RTA 1988.[31] This carries a maximum prison term of 5 years and mandatory disqualification.[32] The difference between this sentence of 5 years and the 14-year sentence for a fatal accident reflects how much the fatal nature of an accident continues to affect the severity of the penalty in England & Wales compared to the penalty applying in the event of a non-fatal injury.

While causing death by driving constitutes an offence in the Netherlands only if it involves significantly careless driving, England & Wales has opted also to designate causing death by relatively minor traffic offences (i.e. by careless driving) as a felony: causing death by careless driving ('CDCD'), which carries a maximum prison term of 5 years and a mandatory minimum disqualification for 12 months (this contrasts with the fixed penalty applying in the event of the mere offence of careless driving). Causing injury or serious injury by careless driving does not yet constitute a felony, although the extent of the injury may be taken into consideration when sentence is passed for the offence of careless driving. The endangerment offence alone, however, carries a maximum fine of 5,000 pounds, resulting in a vast disparity between the penalties for serious injury in the event of careless driving and the offence of CDCD. Causing death by careless driving when under the influence of drink or drugs ('CDCDUI') has been an offence for some time now and carries a maximum prison term of 14 years and disqualifica-

27 Even if the indictment includes more felonies, only one prison term is imposed. The maximum penalties are accumulated, but the total result will not be more than one-third above the maximum penalty for the most serious felony.

28 Article 179, Section 1 WVW 1994 and Article 179, Section 4 WVW 1994.

29 Article 34.4 (a) RTOA 1988.

30 Extreme forms of reckless driving may be prosecuted under the offence of gross negligence manslaughter, which is not discussed here (*see* Cunningham 2008, p. 122).

31 *See* Cunningham 2012; Kyd Cunningham, this book, Section 3.4.

32 On this, *see also* briefly Edwards 2012.

tion for a minimum of 2 years. The consumption of alcohol, therefore, brings the maximum sentence for CDCD into line with the maximum sentence for CDDD, in which alcohol is not a statutory aggravating factor. The 14-year sentence is also well above the maximum sentence of 5 years for causing serious injury by dangerous driving. This demonstrates once again how much weight is attached to fatal injury in England & Wales and how this, particularly in combination with the use of alcohol, sharply increases the maximum sentence that can be imposed.

7.2.3 Conclusion

This outline of statutorily prescribed penalties shows the extent to which penalties are increased by dangerous driving that results in serious accidents. The difference between endangerment offences and result offences is substantial in both jurisdictions. In the Netherlands, contrary to England & Wales, causing a traffic accident through inattentiveness of a minor nature is not considered an independent offence meriting a specific maximum sentence. This is only covered by a single endangerment offence, which may or may not be prosecuted. Causing material damage or minor injury also does not constitute a felony under Dutch law. In England & Wales, on the other hand, criminalization and the associated high maximum sentences depend even more on the gravity of the consequences, i.e. whether the victim died, while the offence of causing serious injury by dangerous driving was introduced only recently. With respect to aggravating circumstances, the focus in England & Wales over the years has been mainly on the consequences (i.e. causing serious injury by dangerous driving, CDCD and CDCDUI).[33] As regards NCDD, the focus in the Netherlands, in terms of aggravating circumstances, is mainly on forms of dangerous or reckless driving. It is noteworthy that endangerment offences are punished relatively mildly. There is specific attention, however, for the dangerous effect of alcohol consumption, and relatively more so in the Netherlands than in England & Wales.[34] It is also noteworthy that sentences for drink-driving are considerably more severe than those for excessive speeding, while it is debatable whether this difference is justified.[35] Finally, disqualification is an important, if not the most important, penalty in both jurisdictions. While the disqualification periods are already relatively long for endangerment offences, and particularly for drink-driving in the case of the Netherlands, they become very long as soon as offences lead to accidents. Indeed, in England & Wales, minimum periods of disqualification frequently apply. All of this clearly reflects both jurisdictions' strong need to rigorously neutralize – at least for the time being – any danger that an offender may still pose.

33 Finally, causing death while driving without a licence, while disqualified or without insurance carries a maximum prison term of 2 years and mandatory disqualification for a minimum of 12 months. *See* Kyd Cunningham, this book, Sections 3.3.4 and 3.7 for recent developments.

34 This does not, of course, apply to CDCDUI.

35 *See also* Cunningham 2008, p. 230.

7.3 Sentencing Guidelines

7.3.1 Importance of Sentencing Guidelines in General

Since the late 1990s, criminal courts in the Netherlands have been using the so-called national benchmarks for sentencing when imposing penalties for frequently occurring offences. Penalties are linked to certain types of offences as starting points ('benchmarks'), but the ranges for these penalties are not prescribed. Except for types of offences, the benchmarks specify almost no aggravating or mitigating circumstances that courts must include in their consideration. The national benchmarks are set within the judiciary by a national consultative body made up of chairpersons of the courts' criminal law divisions. As these benchmarks are not regulated by law, courts are not bound by them. There is no need to substantiate any deviation, and failure to apply the benchmarks does not give grounds for appeal or an appeal in cassation.[36] However, in practice courts tend to use the benchmarks regularly when sentencing. This may promote consistency. On the other hand, courts provide only little justification of how they apply the guidelines in deciding about a sentence to impose.[37] This is one reason why Dutch sentencing practice is based mainly on experience rather than on legal reasoning.

Sentencing guidelines in England & Wales are currently set by the Sentencing Council, an independent public body made up of various people involved in the enforcement of criminal law in some way. The Council's primary task is to design sentencing guidelines in line with the provisions of the 2009 Coroners and Justice Act (CJA). If the nature of the offence permits, the guidelines must describe different categories on the basis of the degree of culpability, the harm caused and any other relevant factors.[38] An appropriate range of sentences must be formulated for every offence, and with more specific ranges for any categories within an offence. Within these more specific ranges, the basic sentence serving as the starting point before any account is taken of other factors must be laid down. In addition, the guidelines must list any aggravating or mitigating factors the court is required to take into account when sentencing an offender, including criteria for determining the weight to be assigned to any previous convictions.[39] Courts are required to follow applicable sentencing guidelines, unless they are "satisfied that it would be contrary to the interest of justice to do so".[40] The court is bound by the range formulated for a particular offence and required to substantiate any deviation.[41]

36 Supreme Court 3 December 2002, ECLI:NL:HR:2002:AE8838 and Supreme Court 10 November 2009, ECLI:NL:HR:2009:BK2678.

37 *See*, *e.g.*, Lensing 2003, pp. 77-79.

38 Section 121 CJA.

39 Section 121(6) CJA.

40 Section 125(1) CJA.

41 *R. v Taylor* (Shaun) [2012] EWCA Crim 630 as commented in Criminal Law Review 2012, 7, pp. 557-560. *See also* Roberts 2012. An alleged wrong choice of category range can be brought before the Court of Appeal (Ashworth 2012).

If an applicable guideline specifies categories, the court is not, however, bound by the applicable ranges.[42]

This CJA framework generally offers the courts a more directive structure for explaining the sentencing part of their judgment, compared with the framework in the Dutch benchmarks. Since the guidelines include ranges and opportunities for deviation, they offer ample scope for imposing a sentence appropriate to each individual case, while the binding effect does not seem to limit the court in its assessment to any disproportional extent.[43] According to Roberts, Hough and Ashworth, sentencing guidelines and the CJA leave enough room for individualization in sentencing, while at the same time structuring sentencing in general terms.[44] Research has shown that sentences in general rarely fall outside the offence range.[45] As in the Netherlands, therefore, guidelines in England & Wales do not in themselves seem to pose a problem for individualized sentencing.

7.3.2 Guidelines for Endangerment Offences

The Netherlands does not have a national benchmark for the offence of endangering traffic or for violating other specific traffic rules. Unless an extrajudicial fine is contested, such cases rarely end up in court,[46] and the Public Prosecution Service has no prosecution guideline on which to base the extrajudicial fine or demand for punishment in such cases involving no more than a traffic offence. There is, however, a specific prosecution guideline on the violation of specific traffic rules, such as driving without a licence, not keeping distance when driving at high speed and serious speeding offences.[47] This guideline includes a recidivism regulation for all of the offences, whereby the extrajudicial penalty is steadily increased if a fine, whether extrajudicial or otherwise, has previously been imposed for the same offence. A summons will then have to be issued at some point. The first time, for instance, that a driver excessively exceeds the speed limit by, say, 69 km/h, the Public Prosecution Service will impose an extrajudicial fine of 1,100 euros and 2 months' disqualification. If the same driver subsequently again exceeds the speed limit by 69 km/h, a summons will be served and the sentence recommended by the Public Prosecution Service is increased to a fine of 1,560 euros and 4 months' disqualification.[48] The courts can decide to align with the principles set out in the Public Prosecution Service's prosecution policy. If such offences lead to

42 This seems to be a way to prevent courts from selecting a category with a range befitting the sentence it intends to impose, instead of first selecting a category and subsequently looking at the corresponding penalty. On this new methodology of sentencing guidelines, *see also* Roberts & Rafferty 2011.

43 *See*, *e.g.*, Ashworth 2012.

44 Roberts, Hough & Ashworth 2012. *See also* Roberts 2012.

45 Wasik 2012.

46 In the writ the defendant is summoned to appear before the subdistrict court, which handles minor offences.

47 Guideline for felonies and misdemeanours for which offence descriptions have been laid down. *See Staatscourant* [Government Gazette] 2012, no. 27256.

48 *See* note 47.

accidents, but are not considered to constitute NCDD, prosecution for an endangerment offence will generally be based on the Guideline for Prosecution of Traffic Accidents, which is discussed in more detail below. If an accident does not result in serious injury, this guideline stipulates an extrajudicial fine of 350 euros.[49]

On the other hand, however, there is a national benchmark for the felony of drink-driving.[50] This contains scales based exclusively on the amount of alcohol in a person's breath or blood. The lowest category attracts a fine of 300 euros for a BAC of 0.054-0.08%, while the highest is punished by 18 months' disqualification and a prison term of 3 weeks for a blood alcohol content of 0.276% or higher. Unconditional disqualification is not imposed below a blood alcohol content of 0.151%. In the event of recidivism and "other aggravating circumstances, such as dangerous driving", the next highest category applies, while disqualification is mandatory in the event of multiple repeat offences.[51] The guideline therefore specifies no aggravating circumstances other than "such as dangerous driving". It is remarkable that the guideline stipulates a prison term of 30 days for the most serious cases with several aggravating factors, which may also be replaced by 60 hours of community service, while the maximum statutory penalty is a prison term of 3 months. Such a gap between the maximum in the guidelines and the statutory maximum exists for many of the offences in the Netherlands. Fines for violations of the RVV stipulated in the guidelines are also relatively minor compared to the maximum prison term of 2 months.

Contrary to the Netherlands, England & Wales has specific Magistrates' Court Sentencing Guidelines for the general endangerment offences of careless driving and dangerous driving.[52] However, in England & Wales, too, it is assumed that these offences, in particular the offence of careless driving, will mainly be prosecuted in the event of an accident without a fatal injury or, in the case of dangerous driving, an accident without serious injury.[53] Many traffic offences in England & Wales, too, are dealt with without a criminal trial. Some cases involve guilty pleas, while minor offences are punished by police-imposed fines. Nonetheless, the guidelines reflect how careless and dangerous driving are assessed, while at the same time illustrating the extent to which possible consequences will be considered in the sentencing.[54] Under both the guideline for dangerous driving and the guideline for careless driving, the courts must determine a fine based

49 Guideline for Prosecution of Traffic Accidents. *See Staatscourant* 2012, no. 26820. Fines have been laid down in legislation as far as the administrative law enforcement of specific traffic offences is concerned.

50 As there are guidelines for refusing an alcohol test and for driving while disqualified.

51 It is not specified, for that matter, whether that should be an unconditional disqualification.

52 Magistrates' Court Sentencing Guidelines, Definitive Guideline, May 2008. Guidelines are available at: <sentencingcouncil.judiciary.gov.uk>.

53 *See e.g.*, Cunningham 2008, pp. 8 and 230 and Cunningham 2012. She notes with respect to careless driving that an offender may avoid prosecution by accepting a mandatory driving course (Cunningham 2008, p. 36).

54 The guidelines assume that the offender has no previous convictions and denies the offence.

on a distinction between three categories of offence seriousness.[55] In the case of both guidelines, a previous conviction may result in the next highest category being applied as the starting point for the sentence, especially if there are also other aggravating circumstances. The lowest category of offence seriousness in the guideline for careless driving is the "momentary lapse of concentration", while the highest is an "overtaking manoeuvre at speed resulting in collision of vehicles or driving bordering on the dangerous". In the first case, a fine amounting to half a week's salary is imposed, while disqualification may be considered in the latter situation. In addition, the guideline contains a number of aggravating and mitigating circumstances to be taken into account by the court, including injury to other persons. However, as stated earlier, the law provides no scope for imposing a fine higher than 5,000 pounds for a serious traffic accident resulting in grievous injury, nor for long-term disqualification.

The guideline for dangerous driving is structured in the same way as the guideline for careless driving. In all cases, a mandatory minimum disqualification of 12 months applies, and 2 years if the offender has had 2 or more disqualifications for periods of 56 days or more in the preceding 3 years. The mildest form of dangerous driving is where dangerous driving leads to an accident resulting in only minor damage. In this situation, therefore, the consequence is the decisive factor. The starting point in sentencing is a community service order of 80-150 hours. The middle category includes "incidents involving excessive speed", which carry a prison term of 12 weeks. Here, too, damage as a consequence of the dangerous behaviour is a factor, while personal injury is considered separately as an aggravating factor. The highest category, too, addresses both conduct and consequence: "prolonged bad driving involving deliberate disregard for safety of others or incidents involving excessive speed [...] by a disqualified driver", which is prosecuted for the Crown Court. No guideline for the sentence to be imposed is specified in this respect. The consequences are a factor putting upward pressure on sentencing in the guideline for dangerous driving, too, even though they are not included in the definition of the offence itself.[56]

The Magistrates' Court Excess Alcohol Guideline specifies four categories, based on the amounts of alcohol in the blood. The lowest category for a blood alcohol content of 0.081-0.137% is a fine of one and a half times the offender's weekly salary and 12-16 months' disqualification, while the highest category for a blood alcohol content of 0.276% or higher is a prison term of 12 weeks, a community service order of 150-300 hours and 29-36 months' disqualification. Here, too, disqualification must be for a minimum of 2 years if the offender has had 2 or

55 A general guideline also applies for assessing the seriousness of offences (Overarching Principles: Seriousness), and this applies to all offences in the Sentencing Council's methodology. This guideline is available at: <sentencingcouncil.judiciary.gov.uk>.

56 The Sentencing Survey researched the most common aggravating circumstances in traffic offences without fatal injury (Sentencing Council, Crown Court Sentencing Survey, Annual Publication 2011, Office of the Sentencing Council, April 2012, p. 22). Aggressive driving and the damage it caused were found to be by far the most frequently mentioned aggravating circumstances, while genuine remorse was found to be the most important mitigating factor as regards traffic offences.

more disqualifications for periods of at least 56 days in the preceding 3 years. These prison terms are considerably higher than those in the Dutch guideline, more or less in proportion to the higher maximum statutory sentences. In the event of a previous conviction for a traffic offence, a minimum of 3 years' disqualification applies. This guideline also contains several factors to be taken into account by courts when sentencing offenders. Involvement in an accident, for example, is an aggravating factor. For the purposes of comparison with serious speeding offences, reference is made to the English Magistrates' Court Sentencing Guideline on Speeding, which stipulates a fine of 1 week's salary and a disqualification for 1 to 8 weeks for exceeding the speed limit by 30 mph. This is quite similar to the Dutch guideline on this point. As regards recidivism, the guideline only stipulates that repeat offences must be taken into account. In this respect, I would point out that other measures, often in administrative law, do include sanctions for repeat traffic offences. An example of this is the system of penalty points for traffic offences that is used in both jurisdictions.

7.3.3 Guidelines for Causing Death or Injury by Driving

The Netherlands has a relatively detailed national benchmark for NCDD (*see* Figure 7.1).

Figure 7.1 National Benchmark for NCDD (Article 6 WVW 1994)[57]

Consequences for victim	Use of alcohol	'Road hogs', reckless driving	Serious error	Significant error
Bodily injury, temporary illness	No alcohol	Unconditional prison term of 2 months 1 year's disqualification	Unconditional prison term of 3 weeks 6 months' disqualification	€1,000 3 months' disqualification
	BAC ≤ 0.13%	Unconditional prison term of 6 months 2 years' disqualification	Unconditional prison term of 2 months 18 months' disqualification	Unconditional prison term of 3 weeks 9 months' disqualification
	BAC > 0.13%	Unconditional prison term of 7 months 3 years' disqualification	Unconditional prison term of 3 months 2 years' disqualification	Unconditional prison term of 1 month 18 months' disqualification

57 The alcohol rate is here specified according to the blood alcohol level, whereas the benchmark specifies the limit only according to the rate of alcohol in expired air. A more recent version of the benchmarks (22 November 2013) is essentially the same, but the prison sentences of 2 months or less are substituted by community service up to 240 hours. This is not necessarily indicative of a change in punishment practice, as it is quite common to sentence an offender to community service rather than to a short prison sentence.

Consequences for victim	Use of alcohol	'Road hogs', reckless driving	Serious error	Significant error
Grievous bodily injury	No alcohol	Unconditional prison term of 4 months 2 years' disqualification	Unconditional prison term of 2 months 1 year's disqualification	Unconditional prison term of 3 weeks 6 months' disqualification
	BAC ≤ 0.13%	Unconditional prison term of 8 months 3 years' disqualification	Unconditional prison term of 6 months 2 years' disqualification	Unconditional prison term of 2 months 18 months' disqualification
	BAC > 0.13%	Unconditional prison term of 24 months 4 years' disqualification	Unconditional prison term of 7 months 3 years' disqualification	Unconditional prison term of 3 months 2 years' disqualification
Death	No alcohol	Unconditional prison term of 8 months 3 years' disqualification	Unconditional prison term of 6 months 2 years' disqualification	Unconditional prison term of 2 months 1 year's disqualification
	BAC ≤ 0.13%	Unconditional prison term of 3 years 4 years' disqualification	Unconditional prison term of 12 months 3 years' disqualification	Unconditional prison term of 6 months 2 years' disqualification
	BAC > 0.13%	Unconditional prison term of 4 years 5 years' disqualification	Unconditional prison term of 24 months 4 years' disqualification	Unconditional prison term of 7 months 3 years' disqualification

NCDD benchmarks are distinguished by the nature of the consequence (injury, grievous injury[58] or death), alcohol consumption (none, moderate or considerable) and the driving behaviour (significant road traffic error, serious road traffic error or reckless driving). A benchmark of 1,000 euros and 3 months' disqualification applies for the lowest category. For the highest category (fatal accident caused by reckless driving while under the influence of large amounts of alcohol), a prison term of 4 years and 5 years' disqualification applies (compared to 18 months' disqualification and 42 hours of community service for drink-driving alone). The latter benchmark of 4 years' imprisonment is reduced to 8 months if no alcohol was involved, which demonstrates how much weight is attached to the consumption of alcohol in the Netherlands. To a certain extent, the guideline gives equal weight to the degree of culpability and the gravity of the consequences: the same benchmark applies to reckless driving resulting in non-serious injury as

58 Both grievous injury and such physical injury that it results in temporary illness or impediment of the performance of daily routines fall under the statutory definition of NCDD.

for a (relatively minor) traffic error resulting in death. The national benchmark specifies no further aggravating or mitigating circumstances, and the implications of recidivism are not worked out in detail. It is remarkable that the sentences for the highest categories in this guideline are also far below the corresponding maximum statutory sentences. In general terms, the most severe sentences in each case amount to 50% of the maximum statutory sentences, which raises the question as to whether the maximum statutory sentences and the benchmarks are sufficiently dovetailed. The reason behind this large difference is unclear.

As noted earlier, causing a serious accident is not an offence in the Netherlands if the degree of culpability is not 'significant'. An alternative can then be to prosecute for the offence of endangering traffic (Article 5 WVW 1994) or for violating specific traffic regulations. Under the Public Prosecution Service's policy, the occurrence of the accident then provides reason to summon the offender.[59] There is no national benchmark for these cases, although the court may, but is in no way obliged to, tie in with the Public Prosecution Service's guidelines. In the event, however, of a fatal accident, the Guideline for Prosecution of Traffic Accidents stipulates a fine of 700 to 1,400 euros and disqualification for 1 to 3 months. Here, the influence of the consequences is essentially reflected in the decision to prosecute rather than in the passing of the sentence, which carries little weight in these types of cases. This is because although courts explicitly take the consequences into account when passing sentence in these cases, they rarely impose sentences exceeding a fine and a short disqualification, and community service orders are imposed only occasionally.[60] If reckless driving results in an accident not constituting NCDD because the injury is too minor or the damage only material, offenders will also be summoned if they have "created an unacceptable degree of foreseeable danger".[61] However, the prosecution guideline does not provide any specific starting points for sentences in such cases.

The English guideline for causing death by driving prescribes considerably more severe penalties and covers several specific offences: CDDD, CDCDUI and CDCD.[62] A guideline for causing serious injury by driving has not yet been published. In the case of CDDD, a very broad range of 2 to 14 years and 3 categories apply. While consumption of alcohol is one aggravating factor, it does not, in contrast to the Netherlands, determine the range within which the starting point for sentencing must lie. The highest category has prison terms ranging between 7 and 14 years, with a starting point of 8 years, and applies to cases in which a conscious choice was made to disregard the traffic rules and to ignore the grave danger to others. This seems to correspond with the aggravating circumstance

59 Guideline for Prosecution of Traffic Accidents. *See Staatscourant* 2012, no. 26820.

60 *See*, *e.g.*, Duker 2012.

61 Instructions for Traffic Accidents. *See Staatscourant* 2013, no. 4861.

62 Sentencing Guidelines Council, Causing Death by Driving, Definitive Guideline, July 2008. The guideline is available at: <sentencingcouncil.judiciary.gov.uk>. The guideline includes an extensive general section on starting points for assessing the gravity of the offence. These usually come down to an explanation of aggravating and mitigating circumstances as listed in the specific guidelines. The offences of causing death by driving when unlicensed, disqualified or uninsured are not discussed here.

of reckless driving in the Dutch guideline (i.e. a prison term of 8 months and 3 years' disqualification, providing no alcohol is involved).[63] The middle category has prison terms ranging between 4 and 7 years, with a starting point of 5 years, and applies to behaviour where the driver's dangerous driving causes considerable risks. This seems to correspond with the serious traffic error in the Dutch guideline (i.e. a prison term of 6 months and 2 years' disqualification). The lightest category has prison terms ranging between 2 and 5 years, with a starting point of 3 years, and applies to behaviour causing significant danger, such as speeding or performing a highly dangerous manoeuvre. This seems to correspond with the significant traffic error, which is the minimum required for the Dutch offence of NCDD (a prison term of 2 months and 1 year's disqualification).

CDCD, too, contains three categories, distinguished by the degree of culpability: (1) momentary inattention; (2) other cases of careless driving; and (3) careless driving verging on dangerous driving. In the event of no more than momentary inattention, a community service order will in principle apply, in addition to mandatory disqualification for a minimum of 12 months (this compares to the fine of between 700 and 1,400 euros and disqualification for 1 to 3 months that applies in the Netherlands). At the second level (i.e. other cases of careless driving), however, the starting point is already a prison term of 9 months, and in cases verging on dangerous driving a prison term of 15 months. The guideline for CDCDUI is even more stringent: for the middle category of 'other cases of careless driving', the starting point is a prison term of 3 years in the event of a blood alcohol content of 0.08%. Here, the consumption of alcohol in combination with causing an accident has an enormous effect on the severity of the sentence. With respect to repeat offenders, the same applies as for CDDD and CDCD. In other words, previous convictions may take the provisional sentence beyond the range given particularly where there are significant other aggravating factors. The upper range of both guidelines, incidentally, either dovetails with or comes close to the maximum statutory sentence.

Although the categories and the lower limit of dangerous driving seem comparable to those of Article 6 WVW 1994, in reality they may differ. Going by what constitutes a significant traffic error in the Dutch benchmark for the offence in Article 6 WVW 1994, CDCD, for example, could also constitute the type of driving referred to in this offence. This would bring the English and Dutch starting points slightly closer together, because of the lower starting points in the guideline for CDCD compared to those in the guideline for CDDD.[64] Although the extent to which offences dovetail with each other on the level of culpability is not the subject of this study, it can be inferred from the guidelines that significantly more severe sentences for causing fatal traffic accidents are stipulated at a policy level in England & Wales.

63 The guideline contains detailed descriptions of cases, including the applicable category. With respect to this highest category, for example, driving with a BAC well above the limit is listed.

64 In England & Wales, too, an offender may be charged with causing death by careless driving, even though the behaviour is clearly dangerous (*Shepherd* [2010] EWCA Crim 46; on this *see*, *e.g.*, Ashworth 2012).

7.3.4 Illustrative Casuistry

It can be inferred from the above that fatal traffic accidents in England & Wales not only constitute a serious offence sooner, but also lead to far more severe sentences. The question is whether this applies only to the law on paper or whether such differences also exist in practice. The guidelines offer no insight, for example, into the possibly considerable influence of personal circumstances on sentencing. Instead, they focus on the gravity of the offence, while the English guidelines even state that they are aimed at defendants who deny the offence. This suggests that sentences may be considerably lower in practice. The extent to which this applies is an interesting question for further study.

As far as I have been able to discover, only a few studies have so far been conducted into sentencing in traffic cases in the Netherlands and England & Wales. In 2003, sentences averaging 43 months' imprisonment were imposed for CDDD and 44 months for CDCDUI.[65] Non-fatal accidents have often been prosecuted under the offences of dangerous or careless driving. A 2004 study found that in 12% of the cases of careless driving the offender was given a disqualification, while 15% of the convictions for dangerous driving resulted in an unconditional prison sentence.[66] As the majority of these cases probably involved serious, but non-fatal accidents, the figure of 15% is plausible.

For the Netherlands, Van Tulder established that 4% of the cases convicted of only NCDD in 2001-2002 resulted in an unconditional prison sentence.[67] In 2003, Lensing conducted a study of 252 Dutch court judgments for the same offence: a prison term was imposed in 12% of these cases, albeit only for reckless driving or multiple repeat offences. The duration varied from 1 month for a driver who lost control of the vehicle while overtaking and killed a cyclist to 3.5 years for a driver without a valid licence who knocked down a pedestrian by driving recklessly after consuming large amounts of alcohol, and who subsequently concealed evidence of the accident.[68] The number of times a prison term was imposed in the Netherlands for traffic accidents suggests that the average sentence is considerably lower than in England & Wales.[69] Compared to England & Wales, therefore, the Netherlands seems more reluctant to impose unconditional prison sentences.

An analysis of actual sentencing practice in the Netherlands and England & Wales goes beyond the scope of this chapter. I will make a brief comparison, however, in order to provide a tangible understanding of the differences between the two jurisdictions as regards sentencing in individual cases. For the sake of convenience, I have limited myself to five examples of fatal accidents, i.e. three from

65 *See* Cunningham 2008, pp. 98 and 105. It should be noted that Cunningham (Cunningham 2008, p. 102) observed that such cases, according to research (Shute 2009), are often referred by the Attorney General to the Court of Appeal on the basis that the sentence was unduly lenient.

66 Pearce 2004, p. 31.

67 At the time of that study, several circumstances currently seen as aggravating circumstances (reckless driving, for example) were not specified in law.

68 *See* Lensing 2003, p. 77.

69 Van Tulder 2003. Data received from the Ministry of Justice's WODC indicate that, in 2009, around 700 summons were served under Article 6 WVW 1994.

England & Wales and two from the Netherlands. Hirst gives the example of a 2007 case, in which the defendant was sentenced to 18 months in prison for CDDD. The defendant had been overtaking, but misjudged the situation and forced an oncoming vehicle to brake. As a result of faulty brakes, the oncoming driver lost control of the vehicle and was killed in the subsequent crash. The offender, who had no prior traffic convictions, was not deemed to have been guilty of any deliberate course of dangerous or aggressive driving. He had made a momentary and uncharacteristic error of judgement, which was not the sole cause of the accident.[70] In another case referred to by Hirst, the offender was sentenced to a prison term of 2 years for the same offence, which was committed because the offender was trying to tune in his new car radio and so failed to react to stationary traffic. Although the collision was not so serious that it would normally cause a fatal injury, this injury was fatal because the victim was not wearing a seatbelt. The offender had no prior convictions, had sustained injury himself and showed great remorse. Lastly, Ashworth gives the example of a CDDD case involving a substantial deviation from the guidelines: while driving home after an emotional visit to the hospital, the offender ended up on the wrong side of the road due to momentary inattention. This caused him to collide with a motorcyclist, who was killed as a result. The offender had no prior convictions. After serving 3 months in prison, he was eventually sentenced to a suspended prison term of 12 months on appeal.[71]

These three examples of cases in England & Wales would be in the grey area between the misdemeanour of endangering traffic and the criminal offence of NCDD in the Netherlands.[72] Some such cases may only just constitute NCDD, while others may fall slightly short. I will give two examples of such cases in the Netherlands. In the first case, a delivery van driver without prior convictions overtook a traffic queue on the left-hand side while exceeding the speed limit. The van driver failed to see that a cyclist was crossing at a junction in the lane in which he was driving. He bumped into the cyclist and the victim died of her injuries in hospital. The District Court acquitted the defendant of NCDD and convicted him of the misdemeanour of endangering traffic. The offender, who showed great remorse, was sentenced to 80 hours of community service and a 12-month suspended disqualification.[73] In the second case, the significant culpability required for NCDD was assumed. This case involved the driver of a car who, during twilight hours, exceeded the speed limit of 80 km/h by 11 to 19 km/h and failed to reduce speed at a bicycle junction. Although he had seen cyclists at the junction, his speed meant he was unable to brake in time so that he killed one of the cyclists.[74] He was given a suspended prison sentence of 2 months, 180 hours' community service and a lengthy (the exact length is unclear) disqualification. These sentences seem considerably milder than those in the above cases in England & Wales.

70 *See* Hirst 2008, p. 347.
71 *See* Ashworth 2012, p. 86.
72 *See* Wolswijk, this book, Section 2.4 on the lower limit of negligence.
73 Haarlem District Court 14 October 2009, ECLI:NL:RBHAA:2009:BK0483.
74 Supreme Court 24 June 2008, ECLI:NL:HR:2008:BC7914.

7.3.5 Conclusion

Sentences stipulated in legislation and sentencing guidelines differ considerably in the two jurisdictions, depending on whether the dangerous driving results in serious accidents. The differences are also substantial in terms of sentencing practice. In England & Wales, lengthy unconditional prison sentences are imposed as soon as driving behaviour with fatal consequences goes beyond momentary inattention, while such sentences are usually imposed in the Netherlands in the event of reckless driving or drink-driving with fatal consequences. In England & Wales, sentences for accidents involving alcohol consumption are even higher. The penalties for dangerous driving, such as drink-driving or seriously exceeding the speed limits, are relatively closer to each other in England & Wales and the Netherlands: these sentences usually involve no more than fines and disqualifications for, at least in the Netherlands, periods of 6 months, with alcohol consumption carrying more weight in both jurisdictions than any other form of dangerous driving. Repeated drink-driving may lead to considerably longer periods of disqualification, which may be seen as a severe punishment. Extreme speeding, however, seems to attract lower sentences than offences involving consuming amounts of alcohol only just above the legal limit. Community service orders are rarely imposed, let alone prison terms, in respect of some endangerment offences.

As noted earlier, sentences for endangerment offences, particularly in England & Wales, are not in proportion to the sentences imposed when offences result in serious accidents. This latter aspect causes sentences in the guidelines, including unconditional prison sentences, to soar. It is remarkable in this respect that the English guidelines for causing death by driving seek to align with the higher maximum statutory sentences, while the Dutch national benchmark is much lower than the statutory maximum. Focusing so strongly on the serious consequences carries the risk, however, of disregarding the offender's sometimes minor degree of culpability.[75] Section 1.18 of the English Overarching Principles for Seriousness Guideline states that:

> where unusually serious harm results and was unintended and beyond the control of the offender, culpability will be significantly influenced by the extent to which the harm could have been foreseen. If much more harm (...) has been caused by the offence than the offender intended or foresaw, the culpability of the offender (...) may be regarded as carrying greater (...) weight as appropriate.[76]

In England & Wales however, the indignation felt in response to fatal traffic accidents has led to a level of sentencing that sometimes exceeds the sentences

75 *See* Cunningham 2012. *See also* Hirst 2008; Van Dijk 2008.

76 In this guideline, the starting point is that culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence. Section 1.17 of these principles stipulates that harm must always be judged in the light of culpability.

handed down in certain manslaughter cases.[77] The question arising from this is how a balance in the standardization of penalties for traffic offences can be found between condemning the considerable harm the dangerous driving has caused on the one hand and the degree of the road user's culpability on the other hand. This question is too extensive to be answered comprehensively here, but I will explore some aspects of it in more detail below. It is important, however, first to explain that the weight the behaviour and the consequences carry in the sentencing does not seem to be consistently laid down in the descriptions of the various offences and corresponding maximum sentences in either jurisdiction. This is a matter of labelling, which I will discuss briefly.

7.4 More Consistent Standardization in Punishing Behaviour and Consequence

Until recently, only a *fatal* accident in England & Wales constituted a specific result offence in traffic, and this is still the case for careless driving. Causing accidents that result in serious injury, less serious injury or large material damage are not independent offences and no corresponding maximum sentences are in place. In such cases, recourse is sought to the endangerment offences. Under the guidelines for endangerment offences, consequences constitute aggravating circumstances, and a particular category usually applies. It is fair to assume, therefore, that the various degrees of seriousness of the consequences are taken into account in actual sentencing. But the way in which behaviour is qualified – in other words, the legal label that is attached to it – does not correspond with the essence of what the offender is blamed for: even though the charge is only an endangerment offence, the fact that it is prosecuted and the sentence that is imposed actually label the case as a result offence because the injury will be central to the assessment. To some degree, this also happens in the Netherlands: traffic errors resulting in slight forms of injury, regardless of whether one or more victims are involved, do not constitute a result offence, but must be prosecuted on the basis of the offence of endangering traffic, for example. Nevertheless, these kinds of errors are of a different order than merely an endangerment offence, because of the accident they caused.[78] Criminalizing result offences more consistently could already be achieved by, for example, introducing no more than three separate offences with respect to material damage, injury (regardless of the seriousness of the injury) and death. Guidelines could then be used to detail further variation.

It can, therefore, be seen as inconsistent to be forced to prosecute for an endangerment offence alone if the accident caused is insufficiently serious. It would be equally problematic, however, to be forced to prosecute for an endangerment

77 *See*, *e.g.*, Hirst 2008.

78 *See also* Hirst 2008. It could be questioned whether there is good reason to distinguish specific result offences for traffic, or whether reference must be made to the general negligence offences of causing injury or death. While this question was researched by Cunningham 2008, I will not deal with this matter here and will take the existence of specific result offences as a starting point in this context.

offence in cases of serious or fatal traffic accidents, when the traffic error does not meet the culpability required for a result offence. England & Wales has dealt with this problem by making CDCD an offence, but this issue was previously subject to debate. The Court of Appeal held in *Krawec*,[79] a case of a careless driving offence that had resulted in a fatal accident, that the unforeseen and unexpected results of the carelessness were not in themselves relevant to the penalty. The reason for this seems to be that the minimally required culpability for a fatal accident should not be circumvented in this manner. The Court of Appeal abandoned this approach in *Simmonds*,[80] when CDCDUI had in the meantime become a specific traffic offence carrying a high maximum sentence. According to the Court of Appeal, it would be anomalous to disregard the fatal accident when – merely as a result of the fact that no alcohol was consumed – it is only possible to prosecute for the offence of careless driving.[81] In my view, the Court of Appeal did not rigorously abandon the principle formulated in *Krawec*, but instead merely attempted to prevent an inconsistency that followed from the statutory methodology of criminalization.[82] Viewed this way, the Court of Appeal appears to acknowledge the problematic character of these sorts of prosecutions. In the Netherlands, too, the offence of endangering traffic is very frequently the alternative charge in prosecutions for negligently causing death or grievous injury in the event of serious traffic accidents caused by relatively minor traffic errors (such as braking too late, failing to notice a road user or taking a corner too widely). The accident is then often part of the indictment and the courts explicitly take it into account in passing sentence, which gives the impression of the offender being convicted for NCDD after all.[83] Such cases usually involve traffic errors that, without the accident, would barely have been reason for an extrajudicial fine. I suspect that the same applies to many CDCD cases in England & Wales.

Under Section 143 (1) of the Criminal Justice Act 2003, a court considering the seriousness of any offence must consider the offender's culpability in committing the offence and any harm that the offence caused, was intended to cause or might foreseeably have caused. It can be inferred from this that it is the court's duty to consider any form of damage in passing sentence, even if the causing of the damage is not an element of the offence. In the Netherlands, too, it is generally accepted that the court may take the consequences of offences into account in passing sentence, regardless of whether they constitute statutory aggravating circumstances. What is exceptional about the offences discussed here, however, is that they concern either endangerment offences or result offences and, therefore, would seem by their very nature to exclude each other. The fact that an accident occurred due to dangerous driving is of such substantial importance vis-à-vis other sentence-determining factors that it no longer constitutes an endangerment offence. If consequences, serious or less serious, are to be taken into account with

79 *Krawec* [1985] RTR 1.
80 *Simmonds* [1999] RTR 257.
81 *See*, *e.g.*, Cunningham 2008, p. 36.
82 This point also seems to be made by Cunningham (*see* Cunningham 2012, p. 270).
83 *See* Duker 2012.

respect to endangerment offences, the offences should be criminalized as such. If it is desirable to also prosecute the causing of traffic accidents due to minor traffic errors, I believe it would be consistent, with a view to punishment, to make this an offence. If the legislator does not opt for a specific result offence in cases where culpability is minor, this should also mean, in my view, that this aspect should not be included in the assessment if it is decided to summon and pass sentence for an endangerment offence. This is because the criminalization of the result offence requiring a specific degree of culpability ('significant carelessness') implies that criminal prosecution of negligence result offences has a function only at that specific degree of culpability.

7.5 Efficacy as a Benchmark for More Balanced Sentencing

7.5.1 Sentencing Practice and Scientific Research as a Basis for Policy

Even if traffic offences are to be consistently criminalized based on the seriousness of the behaviour and the gravity of the consequences, the question still remains as to how a balance can be found (assuming standardized penalties for traffic offences) between condemning the considerable harm the dangerous driving has caused on the one hand and the degree of the road user's culpability on the other hand. Above all, the efficacy of the punishment in the broadest sense of the word (prevention as well as retribution) could be favoured. This is not as obvious as it may seem: what constitutes an effective level of punishment is often judged in abstract terms. What constitutes efficacy, however, could also be made more concrete.

Firstly, this can to a certain extent be inferred from actual sentencing practice as various circumstances can be taken into account in individual criminal cases: the particular gravity of the consequences, the harm caused and the needs of the victims, as well as the personal circumstances and attitude of the offender. All the objectives sought to be achieved through the punishment are in those cases reflected in the decisions. A thorough analysis of actual sentencing practice is, therefore, an important basis, particularly for shaping guidelines for both endangerment and result offences.[84] An interesting example of this can be found in England & Wales: under the CJA, the Sentencing Council must take account of the courts' actual sentencing practice when developing guidelines, including the way in which existing guidelines are applied and the extent of any deviation from them. There is also an obligation to report on that practice annually. In my view, the national benchmarks in the Netherlands could also be accounted for more visibly, based on an analysis of sentencing practice.

84 If personal circumstances in practice considerably reduce the sentence, while guidelines are based on the act component of the offence, such guidelines could prescribe more severe sentences than would be imposed in practice. An explanation of what causes the difference between the guideline and the practice could then be given.

Secondly, what constitutes effective punishment can be inferred from research into the effects of punishment. More general research into the causes of accidents and the effects that traffic offence punishments have on road safety could help to either regulate sentencing practice or, if necessary, correct it. Punishing traffic offences is firstly meant to improve road safety.[85] Standardization of penalties should therefore partly reflect research into how criminal law can most effectively contribute to road safety. Here, too, England & Wales provides a good example: the CJA 2009 requires the Sentencing Council to take the proven efficacy of certain sentences into account when establishing sentencing guidelines. In the Netherlands, a lot of research is conducted by the SWOV Institute for Road Safety Research, an organization responsible for scientific research into road safety.[86] One of its recent reports[87] found, for example, that cyclists and elderly people were especially likely to be victims of traffic accidents. This could be a basis for more specific measures, maybe even in the area of criminal law as well.[88] A more detailed analysis of causes of accidents in England & Wales can be found in the Reported Road Casualties in Great Britain, published by the Department for Transport.[89] This in turn provides a basis for the Strategic Framework for Road Safety.[90] This generates a great deal of knowledge about how road safety can best be enhanced and the most effective way in which criminal law can contribute to this.

7.5.2 How Can Criminal Law Effectively Contribute to Road Safety?

An in-depth analysis of what studies conducted into the effects of punishment have so far shown goes beyond the scope of this chapter,[91] but it can be inferred from research that combating dangerous driving irrespective of the consequences thereof is the best way to prevent accidents. A caveat of the analysis in this chapter, however, is that its emphasis on the relationship between endangerment offences and result offences means it focuses on classical forms of punishment, whereas prevention of traffic accidents in general strongly benefits from all kinds of specific measures, often not even of a criminal law nature. Furthermore, consistent enforcement and a greater chance of being caught are often more important than the nature and severity of a penalty. Regular traffic spot checks are, therefore, essential. However, extra attention also needs to be paid to high-risk groups such as newly qualified drivers and the opportunities presented by measures such

85 On punishment objectives in relation to traffic law, *see* Cunningham 2008, pp. 172-196.
86 Information and scientific research is available at: <www.swov.nl>. *See* note 6 on fact sheets on penalties in traffic.
87 Wijlhuizen *et al.* 2012.
88 The report heavily criticizes the limited knowledge about the exact causes of accidents. The organization has now therefore begun a more advanced and in-depth study into causes of accidents (Davidse 2012).
89 The annual reports are available at: <www.gov.uk>.
90 The framework is available at: <www.gov.uk>.
91 In this respect, too, I refer to Cunningham 2008.

as alcolocks.[92] In this regard, Cunningham places a lot of emphasis, based on research, on the importance of changing attitudes. Many road users overestimate the control they have over their behaviour in traffic and do not see traffic offences as criminal behaviour.[93] Insofar as criminal prosecution and punishment may have added value for enhancing road safety, that value could be reflected *inter alia* by, under certain circumstances, imposing higher penalties for specific endangerment offences as a means of expressing greater moral disapproval.

The proportionality of punishment for serious traffic accidents may not be seen as something that ought to be included in general road safety policy. Severe penalties for – serious – traffic accidents are not usually presented in studies and policy reports as something of particular interest and as having a safety-enhancing effect.[94] The objective of severe punishment, however, may be that it serves as retribution in proportion to the gravity of the offence. In that context, weight could also be given to the gravity of the consequences. However, research has shown that societal views on punishment for serious traffic accidents become more lenient if people look at individual cases in depth.[95] Public indignation about these sorts of offences cannot automatically, therefore, be used as an argument for the level of punishment seen particularly in England & Wales. Dutch research into victim satisfaction also shows that victims and surviving relatives in general feel less need for severe penalties as a form of retribution than, say, for emotional support and the feeling of being heard.[96] If victims *do* feel a need for retribution, it is usually attributable to the offender's intention in performing the action.[97] A traffic error is thus viewed as less serious than reckless driving. Courteous treatment of victims and surviving relatives, and providing them with sufficient information, may sometimes ease the anger caused by the harm inflicted.[98] An offender's sincere remorse for what happened is obviously also an important element.

7.5.3 Indifference as a Sentence-Determining Factor for a More Balanced Policy

It can be inferred from the above that insofar as prosecution and punishment, as well as specific measures such as education, alcolocks and regular traffic spot checks, may help to improve road safety, the focus should be proportionally more on combating dangerous driving and less on seeking to prosecute offenders who

92 Goldenbeld & Van Schagen 2008. *See also* Cunningham 2008, p. 2, who in this regard refers to, among others, Rothengatter 2002, p. 250. It was found in the EU Commission's recommendation on enforcement in the field of road safety, 6 April 2004 (2004/345/EC) that speeding, drink-driving and driving without a safety belt are predominant causes of injuries and casualties and should thus be prevented as much as possible. The recommendation encourages member states to take specific measures to enforce such offences more effectively. It was also found that traffic offences should result in effective, proportional and deterrent sanctions and not in a mere warning, as sometimes is the case for, say, driving without a safety belt.

93 *See*, *e.g.*, Cunningham 2008, pp. 179-182 and 195-196.

94 *See*, *e.g.*, Hirst 2008.

95 *See* Roberts *et al.* 2008. *See also* Cunningham 2008, p. 219.

96 *See* Ten Boom & Kuipers 2008, pp. 53-58.

97 *See* Malsch 2013.

98 On the experiences of victims in England & Wales, *see*, *e.g.*, Cunningham 2008, p. 219 *et seq*.

caused serious accidents as a result of unintentional traffic errors. Against this background, I believe it is not only fair to attach less importance to the consequences in the case of minor traffic errors, but it is also fair to argue that serious endangerment offences, such as drink-driving and extreme speeding, are punished too lightly both in the Netherlands and England & Wales. As long as no accidents are caused, most serious speeding offences never result in a prison term, suspended or otherwise, and only rarely in a community service order, while in the case of drink-driving offences, even those involving considerable amounts of alcohol, such sentences are imposed only in the most extreme cases. If we are to improve road safety, it would seem important to focus, as far as punishment is concerned, on those people who are indifferent to the danger they cause to others.[99] Reckless driving – which can be an indication of such indifference – that results in an accident causes penalties to soar, even in the Netherlands. But this is different in the case of endangerment offences. Indifference can be found as an aggravating factor in the English guidelines for endangerment offences, while in both jurisdictions extreme speeding or drink-driving rarely lead to more than a fine, and only in the most extreme cases to lengthy disqualifications. If reckless driving can result in lengthy unconditional prison sentences (also in the Netherlands) as soon as it causes a serious accident – which I believe is not necessarily a disproportionate punishment – the sentence for reckless driving, too, should rise above the level of fines and mere incapacitation by disqualifications. In any event, I see no clear reason for punishing serious speeding offences less severely than drink-driving.[100]

Although the recidivism factor is not central to the guidelines, I believe it to be an important indication of a road user's indifferent attitude. Under Section 143 (2) of the Criminal Justice Act 2003, the court must treat each relevant previous conviction as aggravating. Principles for weighing recidivism must be formulated on the basis of the CJA (Coroners and Justice Act 2009).[101] Dutch law treats recidivism in similar felonies as a circumstance that may increase the maximum penalty by one-third. Recidivism in the case of endangerment offences such as drink-driving and speeding may justify a lengthy disqualification, which may be experienced as a very harsh punishment. Furthermore, at least in the Netherlands, a relatively strict system of administrative invalidation of the driving licence applies for repeated traffic offences. However, as far as a ground for moral disapproval is concerned, recidivism currently seems to me to play only a modest role in the standardization of penalties, given that road users' self-overestimation and indifference are believed to pose an important risk to road safety. In both jurisdictions, recidivism is not a determining factor in the categorization provided for in guidelines. Essentially, the only role that recidivism plays in traffic offences is that a higher category *may* be applied, but this does not necessarily mean a considerable increase in the punishment. Previous traffic offences have no relevance at all in

99 In this regard, *see* Cunningham 2008, pp. 3, 195-196 and 212-213, where she distinguishes between violations and errors. *See also* Cunningham 2007.

100 For England & Wales specifically, *see also* Cunningham 2008, p. 230.

101 Section 121(6) CJA.

the Dutch benchmark for NCDD. If the consistency[102] or seriousness of previous offences indicates an indifferent attitude towards the safety of others, this would seem to be a circumstance meriting a more determinative and distinguishing role in guidelines, both for endangerment and result offences.

7.5.4 Custody Threshold

Finally, a crucial question in the context of serious traffic offence cases is *when* to take the step – all circumstances considered – to deploy the ultimate means of the unconditional prison sentence. After all, imposing an unconditional prison sentence will obviously change the way the traffic offence and the person committing it are perceived. Balanced punishment of traffic offences in my view also means having uniform basic principles on the appropriateness of that punishment. England & Wales has some general basic principles with respect to imposing unconditional prison sentences. Section 152 (2) of the Criminal Justice Act 2003 stipulates that the court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that neither a fine alone nor a community sentence can be justified for the offence. These principles are worked out in more detail in the Overarching Principles for Seriousness Guideline published by the Sentencing Guidelines Council (from 2004).[103] These stipulate *inter alia* that prison terms can be imposed only for the most serious offences, and only then if it is "unavoidable". However, an unconditional prison sentence is already prescribed – in certain circumstances and regardless of recidivism – for dangerous driving. It seems that unconditional prison sentences are recommended in England & Wales in the event of serious accidents, even those involving less serious forms of poor driving behaviour. There seems therefore to be a tension, which I will not examine here in greater detail, between the general basic principles for imposing unconditional prison sentences and the guidelines for serious traffic offences.[104] England & Wales nevertheless sets a good example for the Netherlands by including basic principles on this subject, however generally they may be formulated.

Neither Dutch law nor the national benchmarks contain explicit basic principles on when an unconditional prison sentence is appropriate. While causing injury by a 'significant' traffic error only leads to a fine in addition to disqualification, causing injury by a 'serious' traffic error already results in a short unconditional

102 Repeatedly committed minor traffic offences could also be included, but the fact that fines are issued to the person in whose name the vehicle is registered and who may not have been driving the vehicle when the offence was committed should be taken into account.

103 The Sentencing Guidelines Council was replaced by the Sentencing Council in 2010.

104 This tension is also manifest in the Magistrates' Court Sentencing Guidelines (p. 163). Prison terms of up to 1 year (51 weeks) may be imposed as suspended sentences (Section 189(1) Criminal Justice Act 2003). It is remarkable that the guideline states that a suspended prison sentence can be imposed only in cases in which a prison sentence would also have been imposed if suspended imposition of the sentence had not been possible. To me this seems to compel a cautious attitude towards imposing suspended prison sentences and may be also, therefore, a reason to impose an unconditional prison sentence.

prison sentence.[105] On the other hand, the guideline for driving under the influence consistently leaves open the choice, even in the most extreme cases, between a community service order, a suspended prison sentence or an unconditional prison sentence. In practice, however, unconditional prison sentences are seldom imposed in any of these cases. A general basic principle as to when an unconditional prison sentence is appropriate is hard to concretize, but it may be possible to devise basic principles for specific offences such as traffic offences. Such principles could give more substance to the debate on the weight of culpability and harm in traffic law. I believe an analysis of the cases in which short unconditional prison sentences were imposed is important in order to establish whether there is a more or less clear line between imposing or not imposing an unconditional prison sentence. Such analysis could also provide a basis for formulating uniform basic principles, and I would expect, in the case of the Netherlands, that reckless driving and the consumption of alcohol in result offences would be important reference points in this respect. In endangerment offences, they would be important reference points as well if accompanied by serious recidivism.

7.6 Conclusion

This chapter has examined the penalties for traffic offences in the Netherlands and England & Wales. My specific focus was on how the relationship between culpability and consequences is reflected in the punishments for traffic offences in these jurisdictions. A comparison of the two jurisdictions demonstrated that endangerment offences are punished at a reasonably similar level, and that drink-driving is severely punished in comparison, for example, to offences involving extreme speeding. Penalties in both jurisdictions were found to soar as soon as the same traffic offences lead to an accident, especially if the accident is fatal. The level of punishment in England & Wales in such cases is significantly higher than in the Netherlands. In both jurisdictions, the penalties for causing traffic accidents are not clearly reflected in the descriptions of the various offences, either because it is only in the event of fatal injury that the offence constitutes a result offence or because the behaviour does not constitute an offence unless the degree of culpability is 'significant'. Insofar as there is a desire to punish the causing of traffic accidents as a result of minor traffic offences and to assign weight to the different forms of damage, such could also be included in the descriptions of the various result offences.

In addition, more balance in the standardization of penalties for endangerment offences and result offences could be achieved by more clearly focusing on the efficacy of punishment. Research into actual sentencing practice and the effects of punishment for traffic offences could then play a key role. Some interesting examples of regulations can be found in England & Wales in this regard. Based on research and in line with frequently expressed views, such as those of

105 In a recently updated version of the benchmarks (22 November 2013) prison sentences of 2 months or less are substituted by community service up to 240 hours. *See also* note 57.

Cunningham, I argue that road users' indifference to the danger they can cause to others is an important reference point for effectively assessing traffic offences. Not only could penalties be milder for result offences in which no indifference is involved, but indifference could also be a reason to punish particular endangerment offences more severely, i.e. imposing punishment above the level of fines and short periods of disqualification. More weight than at present could then be attributed to recidivism. Finally, clear basic principles as to when an unconditional prison sentence is appropriate in serious traffic offence cases may contribute to a sharper debate on culpability and harm in traffic law and, therefore, to more balanced punishment.

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Chapter 8

Traffic Offences in a Behavioural Perspective

*Karel Brookhuis**

8.1 Introduction

For some 100 years now, the popularisation of driving motor vehicles has grown exponentially, with all kinds of side effects. Traffic density increased, though the infrastructure was adapted to the fast-rising number of vehicles, while increasing numbers of crashes took its toll. The large global number of traffic accidents involves high economical costs and human suffering, as indicated by a firm place in the top three death-rate causation in most industrialised countries.[1] The research questions that are studied in this particular field of human behaviour, labelled as traffic psychology, concern among others, imperfect perception, insufficient attention and inadequate information processing of the driver, often because of a low-vigilance driver state on the one hand or a driver state of extreme workload on the other.[2]

Since World War II, car ownership and car mileage have increased steadily in Europe. In the Netherlands, for example, the number of motor vehicles has grown from less than 1 million to about 8 million at the time of writing (and is still rising), covering distances from less than 20 billion kilometres to almost 200 billion kilometres these days. The number of accidents with fatal and/or severe injury outcome initially rose quickly as well. This trend came to a stop in the mid-70s when authorities, car manufacturers and research institutes started to combine forces in order to counter this dreadful increase successfully. A variety of accident-reducing measures, such as intelligent driver support devices, were developed and implemented, leading to a gradual fall in casualties. Within the context of growing vehicle numbers and (new) electronic systems, driving a motor vehicle demands ever more skill and alertness of the driver; the driving task needs constant attention and control.

Driving a motor vehicle is a complex task, where the primary activity seems to be controlling the vehicle to stay on the road properly, moving from A to B, while as a secondary task, but simultaneously, the driver has to process information about speed limits, manoeuvres of other drivers who are doing similar

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1 *See* Smiley & Brookhuis 1987.

2 *See*, *e.g.*, De Waard & Brookhuis 1991, 1997; Lenné *et al.* 1997; Nilsson *et al.* 1997; Brookhuis & De Waard 2000, 2002; Leung & Starmer 2005; Ng Boyle *et al.* 2008.

things, other traffic participants who are not and all kinds of other irrelevant, distracting objects. Looking in the wrong direction or taking your mind off driving at a critical moment can lead to disastrous consequences while driving. Recently, driver inattention and distraction are estimated to be responsible for 20% to 30% of police-reported traffic crashes, depending on the exact definitions of 'inattention' and 'distraction'.[3] Craft and Preslopsky found from two large crash causation studies in the USA that driver inattention/distraction was coded for 20% of truck drivers and 29% of passenger vehicle drivers.[4] Already in 1977, the broad notion of 'recognition errors' predominated the collection of causes that led to the now-common conviction that human factors are involved in more than 90% of all accidents.[5]

In the present contribution, the human factor in traffic accidents and causation is unravelled, with consequences for culpability and liability. In the context of a disgraceful blaming culture in our society, system failure is often regarded as human failure, confusing cause and effect, with large consequences for some parties involved. Solutions are sought and presented below in the realm of intelligent driver assistance systems.

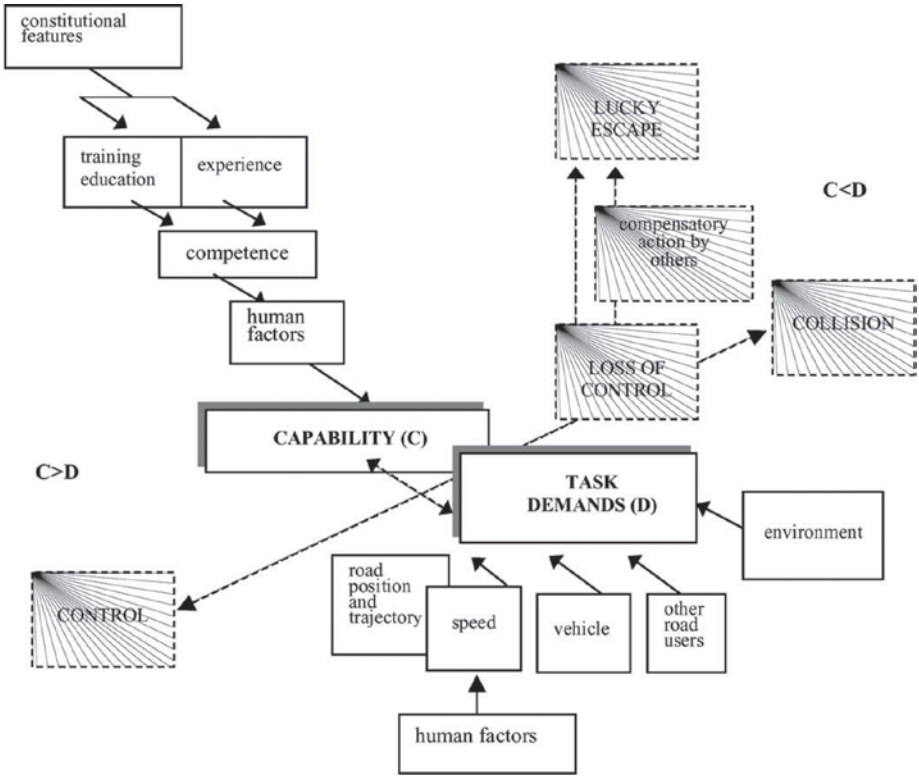
8.2 Theoretical Framework

In order to ensure adequate driving, i.e. proper control over the vehicle, many factors are relevant for the required driver performance. Fuller's Task-Capability Interface model may provide some help in classifying these requirements.[6] The model (Figure 8.1), in short, describes that a driver must continuously try to keep the driving task demands within the limits of what he or she is capable of (C>D in Figure 8.1). If the task demands are too high (C<D), loss of control may occur, for instance in lane and distance keeping. The task demands increase in the case of tasks that are secondary to driving such as, for instance, adverse weather or complex traffic.[7]

The increased demands may be compensated for, rather simply, by reducing speed in order to regain control over the vehicle, which is proposed to be the result of a desire to maintain feelings of risk at an acceptable level (risk allostasis theory).[8] The increased demands could be compensated for by exerting more effort.[9] However, the capacity to do so is not unlimited.[10] As the demands exceed the individual's capabilities, when compensation falls short, casualty odds show an upward trend in an exponential way.

3 Gordon & Regan 2013.
4 Craft & Preslopsky 2013.
5 Treat *et al.* 1977.
6 Fuller 2005.
7 Respectively Brookhuis *et al.* 1991; Hoogendoorn *et al.* 2013.
8 Fuller 2011.
9 De Waard 1996.
10 *See*, *e.g.*, Brookhuis & De Waard 2010.

Figure 8.1 Task-Capability Interface Model (Fuller 2005)



8.3 Human Errors and Support

But however fallible drivers are and however many mistakes they make – whether they encounter unexpected difficulties, make wrong judgements or decisions, or miss relevant signals or objects while driving – fortunately, in practice only occasionally does this collection of failures lead to accidents. One reason for that is related to the ample margins in the traffic environment nowadays. For instance, modern roads are normally wide, leaving lots of room for stray movements or swaying, and when moving across the line, in most cases there is a more or less forgiving (i.e. soft) border. So, in spite of the statistics, drivers are not easily persuaded that they themselves run risks[11] and that they are accident-prone at regular times and would need support. Nevertheless, intelligent driver support has been introduced and accepted quite recently, mostly in the form of electronic driving aids that provide relevant information to the driver. Very recently, electronic systems were introduced that even take over parts of the driving task in case the

11 Svenson 1981.

driver is in need. Many driving aids, however, whether just informing or actually interfering with the driving task, take the form of so-called comfort systems. A nice example of the latter type of systems is the so-called lane departure warning assistance (LDWA), as already introduced by some car manufacturers. LDWA will give a warning whenever the vehicle is crossing the white line marking the lane, either in the form of a sound or a corrective steering movement. The manufacturer sells this system as a voluntary comfort system, in an effort to avoid liability.

Studies in Greece concerning the effectiveness of casualty reduction measures in the ICT field demonstrated that the largest reduction is to be expected from electronic vehicle crash protection systems (15%). For instance, advance cruise control (ACC) or intelligent cruise control (ICC) is estimated to reduce head-on collisions up to 10%. Measures against driving while intoxicated, for instance in the form of detection systems such as alcolocks, were second with 11% in this list. Finally, road safety engineering measures, aiming at increasing obviousness of what sort of behaviour is expected, were reported to result in a reduction of 6.5%.[12] Due to the high cost of the latter type of measures, infrastructure improvements by themselves are not expected to significantly contribute to a reduction of road fatalities. However, a suitable combination of new information technologies with existing infrastructure, or with limited improvements of it, may lead to cost-effective solutions and may become the catalyst towards achieving the EU goal of halving the number of road accidents in the period between 2010 and 2020.[13]

8.4 Human Habits and Limits

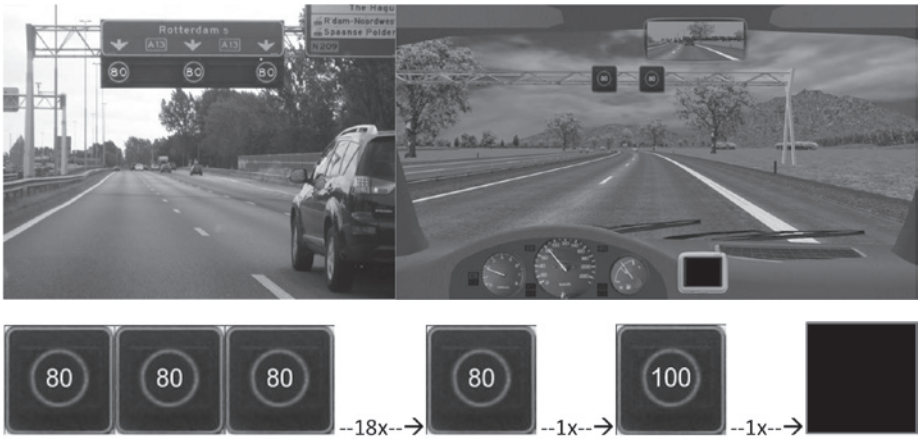
It all boils down to providing suitable, specific information to the driver at the right moment, amounting to a feasible level of information processing capacity, depending on the individual. In principle, that is what road authorities try to realise, certainly these days.[14] But even then, disregarding typical human nature and certain limits that are not so obvious, suitable information provision might easily lead to unjustified enforcement. For instance, habituation and change blindness (looking but not seeing [the obvious]) was studied in depth by Harms and Brookhuis in a driving simulator study, resulting in massive neglect of a speed limit.[15]

Twenty-four participants drove on a simulated motorway (Figure 8.2, right panel) in similar circumstances, with portals equipped with speed signs and a VSL (Variable Speed Limit) indicating a speed limit of 80 km/h. They covered the same route 19 times in a driving simulator, distributed over 5 separate days to drill a pattern of equal driving situation, in other words to get into a form of habit. In this case, the objective was to become habituated to driving with an indicated speed limit of 80 km/h. However, in the 19th trial (ride), the VSL was changed

12 For an overview, *see* Brookhuis *et al.* 2011.
13 European Commission 2010.
14 *See*, *e.g.*, Brookhuis 2013.
15 Harms & Brookhuis forthcoming.

from 80 km/h to 100 km/h. After that, a last trial was conducted with no speed indication.

Figure 8.2 **Upper left panel: a standard Dutch motorway with portal and VSL indicating 80 km/h; upper right panel: a 'standard' simulated Dutch motorway with similar VSL. Lower panel: the successive trials of 18 times with a 80 km/h VSL, the 19th with a 100 km/h VSL and finally without speed indication.**



In the 19th trial, most drivers did not change their speed, whilst only a minority of the participants (37.5%) were able to report the change on the VSL. Driver speed, verbal reports, glance frequency and glance duration while driving showed whether drivers who did not notice the changed speed limits failed to look at the speed limits or looked at them but just failed to notice that they had changed. In the last (20th) trial with no indication, the participants (gradually) increased their speed. After that, they were asked to complete the questionnaires, confirming that they had not seen the change. The continuous offer of a speed indication of 80 km/h had habituated them so solidly that most of them missed the obvious, but small, change. Although no harm would have been done directly in this case in actual traffic, i.e. no punishment, a change from 100 to 80 km/h would immediately have brought drivers into a situation of serious traffic offence, speeding with 20 km/h! However, not deliberately at all! Nevertheless, serious accidents in such a situation might well lead to a sentence in court. The offender could be held liable for negligently causing death or severe bodily injury.

8.5 Human Alertness

Another problem with information processing in traffic that is observed in many studies, if not already in actual everyday life, is reduced alertness. There are many possible sources to be pointed out with respect to reduced alertness which are

different from habituation, such as (situational) stress, distraction or reduced vigilance. Smiley and Brookhuis concluded from numerous studies on vigilance that more than 90% of all traffic accidents are to be attributed to human failure, many of which are caused by inattention at the wheel, mediated through, for instance, fatigue or drowsiness.[16] According to Vallet,[17] it is generally a loss of alertness which is the principal cause of fatal accidents (34%), while fatigue as 'single factor' is estimated to be responsible for (only) 7-10% of all accidents by Tunbridge *et al.*[18] This under-representation of fatigue-related accidents is now well recognised and results largely from the absence of direct evidence of sleepiness or tiredness being a factor. There is no quantitative measure of this effect on drivers. If drivers survive an accident caused by sleepiness, they are unlikely to spontaneously report it; if they do not survive, there is often very little direct physical evidence. Maycock assessed the contribution of sleepiness to car accidents and found that car drivers admitted tiredness to be a major contributory factor in 7% of accident involvement.[19] In a survey of 4,621 UK male drivers, Maycock found that 29% of the population surveyed had been close to falling asleep whilst driving at some time during the previous year.[20] Horne and Reyner also reported that 20-25% of road accidents on motorways in the UK were sleep-related vehicle accidents.[21] Croke, analysing Australian heavy vehicle accidents, concluded that specifically of the high-cost accidents (>50,000 Australian dollars), more than 50% (!) could be attributed directly to driver fatigue as a major causal factor.[22] Ouwerkerk reported that in a survey among 650 European truck drivers, the experience of falling asleep is not uncommon in this professional group.[23] Of the total sample, 60% of the drivers admitted that they had almost fallen asleep at least once, and 16.6% responded they had actually fallen asleep. Almost half of the latter group had an accident as a consequence in that case. Several groups have been identified as being at high risk for sleep-related driving incidents, including individuals who suffer from sleep abnormalities (e.g. apnoea),[24] shift workers who often experience poor sleep quality on rotations and commercial drivers who work long and/or irregular hours.

Driving while suffering from sleepiness (whether consciously or not), driving after five hours or less of sleep and driving at night, i.e. between 2 am and 5 am, were associated with a substantial increase in the risk of a car crash resulting in serious injury or death. Reduction in the prevalence of these three behaviours may reduce the incidence of injury crashes by up to 19%.[25] Thus, reduced alertness, for instance by sleepiness/drowsiness, is a major factor in accident causation.

16 Smiley & Brookhuis 1987.
17 Vallet 1991.
18 Tunbridge *et al.* 2000.
19 Maycock 1995.
20 Maycock 1996.
21 Horne & Reyner 1995.
22 Croke 2000.
23 Ouwerkerk 1987.
24 *See* Howard *et al.* 2000.
25 Connor *et al.* 2002.

However, contrary to the case of habituation, it is more difficult to establish culpability when a driver who is obviously not capable to drive due to drowsiness causes an accident, because the driver in this case is often not even suspected. One reason for this is because furnishing of proof is difficult, to say the least, unless it is frankly admitted. In some cases, however, proof of drowsiness can be based on other sources. On 14 July 2003, a major accident occurred on the main Dutch artery A2, killing two people, causing a giant traffic jam. A big tanker truck lost control and drove into a traffic jam, setting two cars on fire, after which the highway A2 was shut down for several hours. Major road works at the point of accident complicated the arrangement of signs and traffic, and the surveyability because of the quantity, so insufficient attention to all signs seemed the primary cause of the accident. However, since it concerned a major accident, the driving hours and background of the (foreign) truck driver were investigated afterwards. Only then it turned out that a suspicion of sleepiness could be corroborated.

Another prominent example of reduced alertness with respect to the primary task of driving safely is typical for modern times. A review of the literature demonstrates that the introduction, implementation and penetration of information devices (ICT) in the vehicle have increased progressively.[26] In particular, the boost of cellular telephones, navigation systems and now smartphones (combining the latter two) has led to an increase in distraction opportunities within the vehicle. Notwithstanding the legal obligation to take care that as a driver one should be capable of controlling the vehicle properly at all times, paying attention to information providing systems has become part of the driving task. As long as the demands for information processing stay within limits, this need not be a problem.[27] However, particularly being engaged in a telephone conversation bears potential risk.[28] The pros and cons of initiating or accepting a telephone call in terms of risk is predominantly dependent on the level of absorption in the conversation. This may be difficult to judge, in particular with respect to the decision whether to accept an incoming call. Some people, however, cannot resist the urge to 'be online' continuously, which in the case of driving is undoubtedly perilous in the long run. For this reason, having a telephone conversation while driving is prohibited in some countries, while in others such as the Netherlands, only hands-free telephoning is allowed. Liability in case of an accident may be clear when engagement in a telephone conversation is suspected and thereupon proved through the provider, but actual enforcement in daily practice, i.e. in normal traffic, by the police is probably not feasible, if not impossible. Moreover, the violation of privacy claims might obstruct proof in some cases as well.

26 Knapper, in preparation.
27 *See* Fuller 2005; Brookhuis & De Waard 2010.
28 Brookhuis *et al.* 1991.

8.6 Tentative Conclusion

The message until now is confusing, hopefully. While offences in traffic are frequently committed, sometimes leading to serious incidents, some offences (for instance, those attributable to human limits) should not be blamed on the driver, but are. Other offences (for instance, in the case of culpable lack of alertness), however, should be attributed to the offender, but are not. The conclusion should be that even major traffic offences do not always constitute an adequate or justified pretext for far-reaching sentences. On the other hand, some people might smoothly manage to escape appropriate sentencing while having offended seriously.

8.7 Towards a Possible Solution

Since information processing capability seems to be one of the central issues in relation to the consequences of the given examples of the human shortcomings while driving, intelligent driver support may provide a solution in the future.[29] First and foremost point of action would be to monitor and control speed, according to the posted speed limit by means of Intelligent Speed Assistance (ISA) as introduced quite some time ago.[30] ISA would restrain the driver from speeding, handling vehicle speed in an automatic fashion. Implementing ISA widely would decrease accident likelihood and increase transport efficiency considerably.[31] Next, the ISA should be upgraded to a Personal Intelligent Assistant (PIA),[32] which would be able to take over control with respect to communication between the driver and the environment. For instance, no telephone conversation should be put through when the situational demands are too high, while the caller should be informed about the reason. Finally, PIA should be capable of 'reading' the driver's physical condition[33] and to communicate accordingly to assist with the majority of occurring problems while moving, i.e. driving, riding or walking anywhere. If the mental load is too high, speed should be reduced and support provided. In the field of traffic and transport, the first unsteady steps are already taken on the path towards this goal. The contours of a Personal Intelligent Travel Assistant (PITA) have been worked out already for a limited application (travel information), but up to an amazingly far horizon, be it predominantly theoretical as yet.[34] However, PIA would combine all the characteristics just mentioned and assist the driver up to real safety and efficiency.

29 *See* Brookhuis 2008; Dijksterhuis *et al.* 2011.
30 Brookhuis & De Waard 1999.
31 Carsten & Tate 2005.
32 *See* Brookhuis 2008.
33 *See* Dijksterhuis *et al.* 2013.
34 Chorus 2007.

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Chapter 9

A Cognitivist and Volitionist Analysis of Conditional Intent and Conscious Negligence in Traffic Cases on the Basis of Desirability Maximization Theory

*Alwin van Dijk**

9.1 Prolegomenon

9.1.1 Introduction

This contribution aims to answer two related questions. First, how should intent in Dutch criminal law be interpreted? Second, what rules of inference should be used to assess intent? Both these questions are examined in the context of extremely dangerous traffic behaviour. A notorious case in Dutch criminal law – the Porsche case – serves as a springboard for this analysis.

In this prolegomenon, I will explain why it is essential to answer these questions in relation to traffic cases in the Netherlands. In order to do so, it is necessary to examine how the Dutch Supreme Court in general deals with cases pertaining to extremely dangerous traffic behaviour. Furthermore, it will be explained why the analysis in this contribution may be relevant to other criminal law systems as well. Finally, an outline of the chapter will be provided.

9.1.2 The Porsche Case and Its Aftermath

On 3 April 1994, the stage was set for one of the worst traffic accidents ever to take place in the Netherlands. After getting drunk in several bars, the defendant (D) and his friend embarked on a perilous journey in a Porsche. The Porsche turned corners with squeaking and burning tyres, was driven at excessive speeds and ran red lights with undiminished speed. Subsequently, D approached several cars very closely and then overtook them with a swift manoeuvre. Finally, D tried to overtake a Seat. After having aborted three overtaking attempts, the Porsche went to the other lane and collided head-on with an oncoming Volvo. The Volvo's four occupants and D's friend died as a result of this crash.

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This tragic incident gave rise to a notorious and hotly debated Supreme Court judgment. The Court of Appeal had convicted D of intentional homicide on the basis of conditional intent, which can be defined as consciously accepting the substantial chance of the result. The Supreme Court quashed this conviction, appealing to assumptions of a psychological nature. The Supreme Court essentially raised the question of how the finding of conditional intent to kill *another person* could be reconciled with the foreseeable and undesirable prospect of D's *own death* as a result of the collision.

At the time of the 1996 Porsche judgment, it was generally expected that the Supreme Court's ruling would pose an all but insurmountable barrier to establishing homicidal intent in traffic cases. Almost two decades later, it is clear that this prediction turned out to be off the mark. Gradually, more and more lower courts convicted for intentional offences. Almost no convictions that went to the Supreme Court were quashed. Interestingly enough, the Court never backed down from the Porsche case. It appears that providing a more elaborate explanation as to why intent can be established is all that is needed to get around the Porsche case.

In an extended version of this contribution, I examine seven categories of cases where homicidal intent has been proved.[1] The categories pertain to facts and circumstances that justify a 'cassation proof' inference of homicidal intent. This essentially means that the facts and circumstances of the presented cases are (or might be) substantiated in such a way that the Supreme Court would not quash the judgment. I have no space here to describe specifically how lower courts deal with extremely dangerous traffic behaviour. It is important to note, however, that there appears to be great disparity in the way in which comparable cases are handled by different lower courts. One and the same case might just as well lead to a conviction as to an acquittal, depending on the court that handles the case. Generally, the one outcome is just as cassation proof as the other outcome.

9.1.3 The Cassation Free Zone

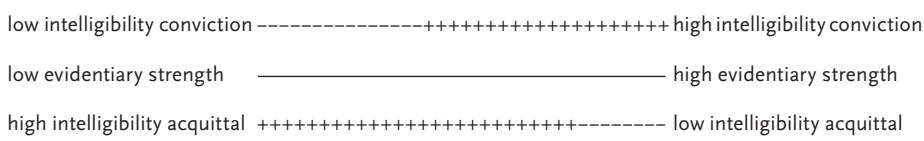
To explain the great disparity between courts, a brief description of the Dutch cassation procedure is in order. A distinction must be made between issues of law and issues of fact. The Supreme Court is authorized to fully assess the lower court's application of the law. Thus, a decision could be quashed if the wrong standard for conditional intent is applied. The Supreme Court has limited power, however, with respect to issues of fact. The selection and evaluation of facts is the prerogative of the lower courts. Although the Supreme Court cannot directly assess the facts, it does have some power. The selection and evaluation of facts, the reasoning in the decision and the inference of intent from the facts (or the decision not to establish intent) are assessed according to an intelligibility standard. A decision is quashed if it is deemed 'unintelligible'; a decision is not quashed if it is deemed 'not unintelligible'. The intelligibility standard appears to be quite steep: the Court only quashes a decision if it is deemed *completely* unintelligible.[2]

1 *See* Van Dijk forthcoming.

2 *See* Van Dorst 2012, p. 197.

Let us imagine that the facts and circumstances of a great variety of serious traffic cases are placed on an evidentiary strength continuum. The further one moves to the right, the higher is the evidentiary strength with respect to homicidal intent. It is possible to make two intelligibility assessments with regard to each point of the continuum. First, how intelligible is it to infer homicidal intent, given the correct interpretation of intent? Second, how intelligible is it to entertain reasonable doubt as to homicidal intent, given the correct interpretation of intent? These assessments are mirror imagines of each other. The more intelligible the inference of intent is, the less intelligible is the presence of reasonable doubt (and vice versa). The two intelligibility assessments are placed above and under the evidentiary strength continuum in Figure 9.1.

Figure 9.1 Intelligibility of Convictions and Acquittals



The upper assessment refers to the intelligibility of a conviction, given a certain evidentiary strength and the correct interpretation of intent. The bottom assessment refers to the intelligibility of an acquittal, given a certain evidentiary strength and the correct interpretation of intent. The minus sign refers to 'cassation'; the plus sign refers to 'no cassation'. It is possible to distinguish between three types of cases.

1. Left side: a conviction is unintelligible (cassation); an acquittal is intelligible (no cassation).
2. Right side: a conviction is intelligible (no cassation); an acquittal is unintelligible (cassation).
3. Overlap in middle: a conviction is intelligible (no cassation); an acquittal is intelligible (no cassation).[3]

The third category is of particular interest for the purposes of this contribution. This category concerns cases where both a conviction and an acquittal would be justifiable from a cassation perspective. It is submitted that this 'cassation free zone' may be quite broad given the large margin of appreciation that is extended to lower courts. The Supreme Court tends to construe many decisions as being 'not unintelligible'.

3 The figure shows that acquittals are less likely to be deemed unintelligible by the Supreme Court (*see* Van Dorst 2012, pp. 129-130). This ultimately results in a larger overlapping area.

9.1.4 Two Sources of Disparity: Evidentiary Rules and Substantive Law

The question is how the disparity between courts in the cassation free zone can be explained.[4] It is submitted that there may be two substantial sources of disparity in Dutch criminal law. First, courts may assess facts and circumstances of a case in a different way. Second, courts may entertain a different interpretation of substantive law.

The disparity between courts can be partially explained by the use of different rules of inference. Courts have different opinions about how likely it is that certain tokens (e.g. crossing a red light whilst intoxicated) are indicative of homicidal intent.[5] It is obvious that differences in the evidentiary strength attributed to tokens could result in a different outcome of a case. Such decisions are beyond the reach of the Supreme Court if the rules of inference are 'not unintelligible'.

Another potential source of disparity lies in the interpretation of substantive law. It is submitted that it is quite unclear how intent should be interpreted according to the Supreme Court. This ambiguity does not necessarily hinder lower courts in employing the concept. All that is required is that they use the same – ambiguous – terminology as the Supreme Court to designate intent. It is perfectly possible, however, that lower courts using the exact same language to designate intent ascribe to completely different interpretations of intent. For example, one court may hold that intent is a psychological concept that requires a degree of awareness bordering on oblique intent, whereas another court may hold that intent is a normative, non-psychological concept, for which no mental state is required.[6] These different interpretations could obviously result in a different outcome of a case. However, such decisions are beyond the reach of the Supreme Court as long as the correct terminology is employed and the decision passes the intelligibility test with respect to issues of fact.

9.1.5 Aim and Relevance of This Contribution

Variance between courts is indicative of some kind of error. If two courts reach a different outcome in an equal case, one of the decisions must generally be wrong. Variance between court decisions and error of court decisions can be reduced in two ways. First, courts should employ the same, correct interpretation of intent. Second, courts should make use of the same, correct rules of inference to assess intent. These solutions are connected to each other, since evidentiary rules pertain to the substantive concepts that must be assessed.

One of the goals of this contribution is to provide more clarity on how to interpret and assess intent, so as to give lower courts proper guidance. The analysis will

4 It is noted that disparity also occurs outside the cassation free zone, because many decisions, some of which are unintelligible, never reach the Supreme Court.

5 To be more precise: it is about *different* rules of inference, given the *same* interpretation of intent. It is obvious that rules of inference are contingent on the probandum in question.

6 The latter interpretation may lie outside the realm of acceptable interpretations. In the extended contribution (Van Dijk forthcoming), I submit that some courts, in establishing homicidal intent, may secretly ascribe to a normativist, non-psychological view on intent.

for the most part focus on the first source of disparity and error (interpretation of substantive law). The Porsche case serves as a springboard for this analysis. The central question is whether a cognitivist or a volitionist interpretation provides the best explanation for the Porsche ruling. In the process of analysing substantive law, I introduce a psychological theory that is relevant to the second source of disparity and error (evidentiary rules). It is submitted that this theory – Desirability Maximization Theory – can serve as a general framework for analysing traffic cases.

Although this contribution pertains to Dutch criminal law, it is endeavoured that the analysis might be relevant to other criminal law systems as well. Quite a few legal systems recognize conditional intent or employ a similar concept such as recklessness. The question whether a cognitivist or a volitionist criterion is to be preferred has therefore a much broader relevance. The evidentiary framework that is introduced, Desirability Maximization Theory, also has a broader relevance. It is a general theory that serves to predict whether a certain mental state has been present. As such, it might have value with respect to all psychological *mens rea* terms.

9.1.6 Outline

This chapter is structured as follows. Section 9.2 provides relevant background information on the relationship between homicidal intent and dangerous traffic behaviour. The section delves briefly into the relevant law, legislative history, doctrinal views and the Supreme Court's case law. It also contains a more extensive description of the Porsche case. In Section 9.3, I provide a cognitivist analysis of the Porsche case. The Porsche case is subjected to a psychological analysis according to a rational theory of choice (Desirability Maximization Theory). Section 9.4 contains a volitionist analysis of the Porsche case. Several volitionist theories that might explain the Porsche ruling are being examined. The final conclusion (Section 9.5) deals with the question of whether it is generally plausible to infer homicidal intent in cases of dangerous traffic behaviour.

9.2 Homicidal Intent in the Context of Dangerous Traffic Behaviour

9.2.1 Introduction

This section provides some relevant background information with regard to the application of homicidal intent to traffic cases. Section 9.2.2 provides an introduction to the concept of conditional intent. Section 9.2.3 delves briefly into the applicable statutes for serious traffic cases. Sections 9.2.4, 9.2.5 and 9.2.6 deal respectively with legislative history, doctrinal views and the Supreme Court's case law with regard to conditional intent. Subsequently, a more extensive description of the Porsche case will be given (Section 9.2.7).

9.2.2 Why Is Homicidal Intent Ascribed to Dangerous Road Users?

Barring exceptional situations, drivers do not act in order to kill other human beings. Even people who drive at excessive speeds, overtake dangerously or are extremely drunk aim to reach their destination without causing accidents. How then is it possible that the legal concept of intent is applied to such cases? An essential explanatory factor is the broad interpretation of intent in the Netherlands. The Dutch concept encompasses not only direct intent (purposely) and oblique intent (knowingly), but it also encompasses conditional intent. The following definitions provide a provisional outline of these concepts.[7]

Someone acts with *direct intent* of causing a result if he acts because he wants that result and believes that his action might have that result.

Someone acts with *oblique intent* of causing a result if he acts whilst being virtually certain that the result will happen.

Someone acts with *conditional intent* of causing a result if he acts whilst consciously accepting a substantial chance that the result will happen.

In case of direct intent, the result provides a reason for acting.[8] The person acts in order to achieve the result. This characteristic is absent in oblique and conditional intent. We can only say that the foreseen virtual certainty or substantial chance of the result does not provide a sufficient reason for not acting. Whether or not the acceptance condition adds anything vital to the definition of conditional intent is a major bone of contention.

This contribution deals only with conditional intent. Conditional intent is the lowest form of intent, bordering on the highest form of negligence. Conditional intent can be defined as consciously accepting a substantial chance of the result. This interpretation of intent is surely at odds with the plain meaning of the English terms 'intent' or 'intentionally'. It is also at odds with the legal interpretation of these terms in the United States and England and Wales. Conditional intent bears resemblance to 'recklessness' in the United States Model Penal Code: consciously disregarding a substantial and unjustifiable risk.[9] It is also related to 'Cunningham recklessness', the dominant interpretation of recklessness in England and Wales. In *R. v. Cunningham*, recklessness was held to require that "the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it".[10]

7 The definitions are only meant to give a rough idea of these concepts. They are not consistent with all views on intent that are featured in this contribution. It is noted that the term 'act' in the definitions also refers to omissions.

8 *See* Duff 1990, pp. 58-63.

9 Article 2.02.2(c).

10 *R. v. Cunningham* [1957] 2 QB 396.

The Dutch term that is translated as 'intent' (*opzet*) has the same plain meaning as the English term. To answer the question why this concept has been interpreted so broadly, we must return to the introduction of the Dutch Criminal Code (CC) in 1886. The legislator introduced two kinds of offences: felonies and misdemeanours. Felonies generally had an intent requirement, but in exceptional cases negligence sufficed. The general offence of negligent homicide (Article 307 CC) was such an exception. Between 1886 and 2006, the maximum prison term for negligent homicide was only nine months. In contrast, the maximum prison term for intentional homicide was (and still is) fifteen years. The Supreme Court's acceptance of conditional intent in 1954 can be plausibly explained by the fact that intentional felonies either did not have a negligent counterpart or had a negligent counterpart with a much lower maximum punishment. A more literal interpretation of intent would often thwart the imposition of an appropriate punishment.

The broad interpretation of intent makes it less surprising that intent is ascribed to road users behaving dangerously. This is still far from self-evident, however. In other countries that accept conditional intent, it is only ascribed to road users in highly exceptional cases.[11] This raises the question of why there is such willingness to prosecute and convict for intentional offences.[12] One explanatory factor may be that the high maximum penalties that now apply for negligence in traffic (*see* next section) can only be imposed in case of death or serious injury. The misdemeanour of causing road danger only carries a two-month maximum prison term. Thus, very dangerous behaviour that does not cause a serious result can be punished much more severely if D is convicted of *attempting* to commit an intentional offence. The intent requirement for attempts is the same as for complete crimes: conditional intent suffices.

9.2.3 Applicable Offences in Traffic Cases

I will now provide a brief overview of applicable offences in serious traffic cases in the Netherlands. The most important offence for this contribution is intentional homicide. The only difference between intentional homicide (Article 287 CC) and the graver offence of murder (Article 289 CC) is premeditation. This aggravating factor, which also applies to the other intentional offences described below, is not examined in this contribution. The offence definition of intentional homicide makes someone liable to a maximum prison term of fifteen years if he "intentionally takes the life of another". Other relevant offences are Article 302 CC (intentionally causing severe bodily injury) and Article 300 CC (intentionally causing injury or pain). In these offences, causing a more severe result than intended is an aggravating factor. For this factor to apply, only causation must be established. All mentioned intentional offences, except Article 300 CC, can give rise to inchoate liability. In case of attempt, the maximum punishment is decreased by a third.

11 Germany provides a good example. *See* Goeckenjan, this book, Section 5.4.1.

12 *See further* the extended contribution (Van Dijk forthcoming).

Article 6 Road Traffic Act (RTA) contains a special offence for negligently causing death or severe bodily injury in traffic.[13] This offence pertains to two grades of negligence: negligence (*schuld*) and recklessness (*roekeloosheid*). It should be noted that recklessness does not necessarily require a mental state: the fact that D should have been aware of creating a very serious danger may suffice.[14] The maximum prison term in case of causing *death* is three years for negligence and six years for recklessness. The maximum punishment for both negligence and recklessness is increased by one-half in case of specified aggravating factors (four and a half years or nine years). The aggravating factors boil down to intoxication, non-cooperation with a substance test, severe speeding, tailgating, not yielding right of way and dangerous overtaking. All mentioned maximum punishments are halved in case of causing *severe bodily injury*.

If dangerous traffic behaviour does not lead to death or severe bodily injury, the negligent offence does not apply. In that case, Article 5 RTA (causing road danger) provides an alternative. This offence is only a misdemeanour and carries a two-month maximum prison term. Although there is no explicit *mens rea* requirement, it is possible to invoke an absence of culpability defence.

Table 9.1 contains an overview of relevant offences. The maximum punishment is provided in relation to several previously mentioned circumstances. The circumstance of 'multiple victims' relates to the rules on concurrent sentences. If a traffic collision has multiple victims, the maximum punishment will be increased by one-third.

Table 9.1 Overview of Relevant Offences

Offence	Circumstances	Maximum punishment (years)
Intentional homicide (Art. 287 CC)	Basic offence	15
	Multiple victims	+ ⅓
	Attempt	– ⅓
Intentionally causing severe bodily injury (Art. 302 CC)	Basic offence	8
	Death	10
	Multiple victims	+ ⅓
	Attempt	– ⅓
Intentionally causing injury or pain (Art. 300 CC)	Basic offence	3
	Severe bodily injury	4
	Death	6
	Multiple victims	+ ⅓
	Attempt	Not possible

13 *See* Wolswijk, this book, Chapter 2.

14 *See* Supreme Court 15 October 2013, ECLI:NL:HR:2013:959: "To establish recklessness [...] the court must determine facts and circumstances from which it can be inferred that the defendant has created a very serious danger by extremely negligent behaviour, and that the defendant was aware of this or at least should have been."

Offence	Circumstances	Maximum punishment (years)
Negligent homicide in traffic (Art. 6 RTA)	Basic offence	3
	Aggravating factor	4.5
	Recklessness	6
	Recklessness + aggravating factor	9
	Multiple victims	+ ⅓
	Attempt	Not possible
Negligently causing severe bodily injury in traffic (Art. 6 RTA)	Basic offence	1.5
	Aggravating factor	2.25
	Recklessness	3
	Recklessness + aggravating factor	4.5
	Multiple victims	+ ⅓
	Attempt	Not possible
Causing road danger (Art. 5 RTA)	Basic offence	2 months
	Attempt	Not possible

9.2.4 The Emergence of Conditional Intent [15]

The Dutch Criminal Code came into effect in 1886. Minister of Justice Modderman, who had been part of the commission that devised the code, is a key figure in legislative history. He has had a profound influence on doctrinal thinking. Nothing has proved more important than his assertion before Parliament that intent is both about 'wanting' and 'knowing'. The distinction between the volitional element ('wanting') and the cognitive element ('knowing') provides the cornerstone for almost all scholarly treatises.

Modderman argued before Parliament that conditional intent should be recognized. He maintained that acting whilst foreseeing that this would result in a particular consequence can be regarded as conditional intent. Modderman gave an example that can be seen as a precursor to the Porsche case. According to Modderman, a horseman who keeps on galloping through the streets without taking any precautionary measures, although he understands that a child will be crushed if he continues, does not act with conscious negligence, but with conditional intent.

From this and other passages, it cannot be inferred how much uncertainty with respect to causing the result is allowed for conditional intent. It is obvious, however, that Modderman's conception of intent stretches well beyond the boundaries of direct intent, where the actor's volition provides a reason for acting. This raises the question of how his view can be reconciled with his assertion that intent is both about 'wanting' and 'knowing'. Modderman solved this conflict with an intriguing rhetorical move. According to him, a person who acts with conditional intent may not have *desired* the consequence, but he *wanted* it nonetheless.

The distinction between 'desiring' (*wensen*) and 'wanting' (*willen*) is hard to defend linguistically, both in Dutch and English. This strained construal of 'wanting' compels one to say that smokers *want* to die of cancer or that dentists *want* to cause pain. The absurdity is most obvious if someone directly intends Φ,

15 *See* Van Dijk 2008, pp. 212-223 and 411-413.

but knows that not-Φ might happen. We now have to say that this person both wants Φ and not-Φ.

Modderman's broad view on intent was not well received in Parliament. On the day the Criminal Code was accepted by Parliament, Modderman declared that questions about the twilight zone between intent and negligence should be resolved by legal practitioners and scholars. In 1954, more than seventy years after Modderman's words, the Supreme Court finally settled this issue by recognizing conditional intent.[16] Over the years, the Supreme Court has used different expressions to demarcate conditional intent. An invariable aspect of current definitions is that the chance should be *substantial*. The simplest definition of conditional intent is: conscious acceptance of a substantial chance. The Supreme Court's case law will be outlined after a brief digression into scholarly views on intent.

9.2.5 A Cognitivist, Volitionist and Normativist Theory of Intent[17]

Introduction

Scholarly handbooks have played an important role in the further development of conditional intent. In this section, I examine the views that are laid down in some important handbooks that appeared between 1991 and 2003.[18] These views provide a good starting point for analysis. Two aspects are of interest. First, all handbooks purport to do no more than give a description of the law at the time. Second, all handbooks rely heavily on the parliamentary history and analyse intent by reference to a volitional element ('wanting') and a cognitive element ('knowing'). At first blush, there would seem to be general consensus about the interpretation of intent. Closer analysis shows, however, that the terms 'wanting' and 'knowing' are interpreted in strikingly different ways. These differences are primarily relevant with regard to the lower boundary of intent (conditional intent). In the following, I classify the examined views according to three distinct theories of intent: a cognitivist, volitionist and normativist theory.

Cognitivist Theory[19]

The cognitivist theory takes intent to be a psychological concept. Although intent is analysed using 'wanting' and 'knowing', the cognitive element is heavily emphasized. Someone acts with conditional intent of causing a result if he acts whilst foreseeing that there is a substantial chance of the result occurring. The volitional element is analytically dependent on the cognitive element: someone who acts whilst *knowing* the result might happen is held to have *wanted* the result.[20] As Nieboer stated succinctly: knowing + acting anyway = wanting.[21]

16 Supreme Court 9 November 1954, NJ 1955, 55.
17 *See* Van Dijk 2008, pp. 223-230 and 241-261.
18 Although these handbooks are somewhat outdated, the theoretical assumptions are still useful.
19 *See* Nieboer 1991, pp. 145-182; Strijards 1992, pp. 111-134.
20 Section 9.3.7 contains an explanation for this connection.
21 Nieboer 1991, p. 155.

The boundary between conditional intent and so-called conscious negligence is solely determined by awareness of the substantial chance. Someone acting despite awareness of the substantial chance acts with conditional intent. If someone is not aware of a *substantial* chance whilst acting, there can at the most be conscious negligence. In that case, both the cognitive element and the contingent volitional element are not fulfilled. Only wants that are tied to foreseeing a substantial chance are regarded as 'wanting' in this context. The awareness that is implied by the term 'conscious negligence' is constituted by a lesser kind of awareness. This is present if someone acts whilst being aware of a non-substantial chance of the result. Acting despite this lesser kind of awareness is insufficient to fulfil the volitional element.

Volitionist Theory [22]

The volitionist theory that is espoused by Remmelink also takes intent to be a psychological concept. In this view, the volitional element is emphasized. The cognitive element is held to be equally present in conditional intent and conscious negligence: the difference revolves exclusively around the volitional element. Conditional intent is present if someone decides that he wants to act even if the undesired result may be attached. If he wants this result nonetheless, rather than abandoning his act, then his intent is also directed at this result. Conscious negligence is present if someone considers the disastrous result, but dares to proceed because he does not believe in its fulfilment, and would cease his act if he did expect the result to happen. Remmelink illustrates this as follows.

> This may be the case with a driver who drives at high speed through a busy street to catch his train. The possibility of a collision flashes through his mind, but is pushed back by the consideration that he has often done this without causing accidents [...]. If he does run over someone, then conscious negligence can be adopted. If he drives this fast because he is chased by the police and wants to abscond at any price, then intent is to be adopted in case of a collision. He puts up with that result, he pays that price, as long as he absconds.[23]

Remmelink argues that the volitional element is completely present in conditional intent; the cognitive element, however, is diluted to a mere realization of the possibility of a result. In conscious negligence, the cognitive element is the same, but the volitional element lacks completely. In contrast to the cognitivist theory, 'knowing' and 'wanting' are not analytically connected. The difference between intent and negligence revolves exclusively around the volitional element.

The question is how this volitional element should be interpreted. Remmelink attaches great importance to the actor's attitude. A negligent actor would hate it if the result were to happen, whereas the intentional actor would be indifferent. The actor's attitude is gauged by means of a criterion that pertains to a hypothetical situation. The intentional actor *would* continue his act even if he had been more

22 *See* Remmelink 1996, pp. 201-241.

23 Remmelink 1996, p. 205.

certain about the result. The negligent actor *would* desist. Remmelink seems to imply that the actor actually must have contemplated what he would do if he had been more certain about the result. That means that the volitional element is negated in the following two cases. First, if the actor has considered that he would not act if he were more certain. Second, if the actor has not considered what he would do if he were more certain.

Normativist Theory [24]

The normativist theory holds that intent is not a psychological concept. Intent can be defined as a normative (non-psychological) concept if the court, in ascertaining intent, does not necessarily have to make an assertion about a mental state. This definition conveys that the normative character is a matter of substantive law. According to the normativist theory, the probandum is of a non-psychological nature. The mere fact that intent is proved on the basis of objective circumstances does not make for a normative concept.[25] The normativist view in the handbooks in question must be set against the background of the dissertations of Peters and Brouns.

Peters radically departed from the legislator's view that intent is a psychological concept.[26] He argued that the terms 'wanting' and 'knowing' should be discarded, because mental states are completely irrelevant for the determination of intent. In his view, intent is the social meaning attributed to a psycho-physically neutral act. In Peters's words: "It is possible, then, that an act has the meaning of 'intentional homicide', just because what has been done 'goes for' intentional homicide, although the actor did not have the intention to kill."[27]

Brouns defended three propositions in his dissertation.[28] (1) Intent is not only 'knowing', but also 'wanting'. (2) Intent is not a mental state. (3) The meaning of intent varies according to the offence definition. Brouns's normativist view can best be explained by the fact that he does not make a sharp distinction between the concept of intent (substantive law) and the manner in which intent is proved (evidentiary law). Objective circumstances used to prove intent are taken to be part of the concept of intent. This may also explain his view that intent does not have a uniform meaning, i.e. in some offences 'wanting' is more important, whereas in other offences 'knowing' is more important. It may well be that for some offences the evidence is generally more cognition related, whereas the evidence for other offences tends to be more volition related.

All handbooks in this category imply that intent is not a completely psychological concept. A potentially confusing aspect of these views is that the traditional psychological terms 'wanting' and 'knowing' are retained. The traditional terms are simply redefined in a normativist vein. All handbooks follow Brouns's view that intent has no uniform meaning. Why, when and how the volitional and

24 *See* Kelk 1998, pp. 163-220; De Hullu 2000, pp. 193-265; De Jong & Knigge 2003, pp. 97-139.
25 *See* Blomsma 2012, p. 130.
26 Peters 1966.
27 Peters 1966, p. 315 (English summary).
28 Brouns 1988.

cognitive element vary is not elucidated. This makes it very difficult to compare this theory to the two psychological theories of intent. Since intent is a normative concept, it is possible that the volitional and cognitive element are fulfilled when someone does not 'want' or 'know' in a psychological sense. In this respect, the normativist theory is broader than the psychological theories. In other cases, it may be more restrictive. Intent according to a psychological theory may not always amount to intent in a normativist sense.

9.2.6 The Supreme Court's View on Conditional Intent

All authors analysed in the previous section purported that their characterization of intent was in accordance with the legislative history and the Supreme Court's case law of that time. It has been demonstrated, however, that the terms 'wanting' and 'knowing' were interpreted in strikingly different ways. The question which of these 'descriptions' is most in line with the legislative history or the Supreme Court's view at that time will not be explored. The examined handbooks are to some extent outdated, because the Supreme Court has since gone on to be more explicit about the interpretation of intent. This section will briefly examine the Supreme Court's more recent case law.

In 2003, the Supreme Court decided two important cases regarding HIV transmission (*HIV I* and *HIV II*). In the HIV II case, the Court of Appeal had convicted D of attempted intentional homicide.[29] The court based its judgment about the substantial chance of death partially on the gravity of the result at stake. This interpretation accorded with certain scholarly views that 'substantial chance' should be interpreted as 'unacceptable chance'. Thus, when a life is at stake, even a tiny chance may be regarded as unacceptable. The Supreme Court rejected this view. It held that the concept of substantial chance ought not to depend on the nature of the result. In all cases, the chance must be substantial according to rules of general experience.

The Supreme Court held that a substantial chance of *death* could not be inferred from the evidence, but implied that a 0.4% chance of transferring HIV did amount to a substantial chance of *severe bodily injury*. This view was later revoked. The Supreme Court held that there could only be a substantial chance of severe bodily injury in HIV cases in "exceptional, risk-increasing circumstances".[30] This condition was not even fulfilled in case of numerous instances of unprotected intercourse between D and V (victim).

As it stands now, it is unclear what chances can be regarded as substantial in this and other contexts. However, the ruling that the concept of substantial chance ought not to depend on the nature of the result is still relevant. In the HIV I case, the Supreme Court also gave some general directions as to the interpretation of conditional intent. These considerations are also still valid today.

29 Supreme Court 24 June 2003, ECLI:NL:HR:2003:AF8058.

30 Supreme Court 20 February 2007, ECLI:NL:HR:2007:AY9659 (*HIV IV*).

> [To establish conditional intent] it is not only required that the defendant has knowledge of the substantial chance that the result will occur, but also that he consciously accepted (took for granted) that chance at the time of his act. From the mere fact that this knowledge is present [...] it cannot necessarily be inferred that he consciously accepted the substantial chance of the result, because in case of that knowledge conscious negligence might also be adopted. Of someone who has knowledge of a substantial chance of the result, but who [...] assumed that the result would not occur, it can be said that he acted with (gross) inadvertence but it cannot be said that [he acted with conditional intent].[31]

It is difficult to say which of the three previously described theories best explains the Supreme Court's current stance on intent. The normativist theory is the most difficult to reconcile with the Supreme Court judgment. The Supreme Court uses quite a few psychological terms to delineate intent. Furthermore, in a later passage the Supreme Court explicitly sets forth that statements by the defendant or witnesses may provide insight into "what went on in the defendant's mind" at the time of the incident.

At first blush, the Supreme Court's delineation of conditional intent seems to accord best with the volitionist theory, because the Court states that knowledge can both be present in intent and negligence. However, the Supreme Court fails to provide a proper volitional criterion to distinguish conscious negligence from intent. As will be further explained in Section 9.3, it is still possible to advance a cognitivist interpretation.

9.2.7 The Porsche Case

The chronicle of the Porsche case began on 3 April 1994 around 17.00 hour when D, a twenty-six-year-old car salesman, drove to his friend's home to help him move some Porsche spoilers.[32] After that they visited four bars, driving a Porsche 928s. In each bar, they drank up to five beers. Subsequently, the friends embarked on a perilous journey that would end up killing five people. Witnesses declared that the Porsche turned corners with squeaking and burning tyres, was driven at excessive speeds and ran red lights with undiminished speed. At the road where the collision occurred, the Porsche approached several cars very closely and then overtook them with a swift manoeuvre. Around 19.40, a Seat driver became aware that a Porsche had raced up on his tail. He testified that the Porsche had aborted three overtaking attempts, moving swiftly to the other lane and returning ever so quickly. The fourth overtaking attempt led to a head-on collision with a Volvo 340.

The Porsche was completely in the other lane when it collided with the Volvo. All four occupants of the Volvo, two related couples, died instantaneously. D's friend died shortly afterwards. The wounded D left the burning wreck of the Porsche and fled to the home of his friend's brother. Around 23.00 hour, he was

31 Supreme Court 25 March 2003, ECLI:NL:HR:2003:AE9049.

32 The description of the facts of this case is based on the original case file and the Supreme Court judgment (Supreme Court 15 October 1996, ECLI:NL:HR:1996:ZD0139).

apprehended in a hospital. At 0.15 hour, a blood sample was taken. His blood alcohol content turned out to be 0.072%. At first, D claimed that an unknown man had been driving, but he claimed later that his friend had been the driver.

The collision occurred on a straight road with an 80 km/h speed limit. It was still light and oncoming traffic was clearly visible. The Volvo's lights were on. The Porsche left a 21.30-metre skid mark and the Volvo left no skid marks. It was estimated by the police that the Volvo had been driving between 70 and 75 km/h. The Porsche's speed was estimated to have diminished with 64 km/h whilst braking. D declared that the Porsche's original speed had been between 120 and 130 km/h.

The Court of Appeal convicted D of multiple counts of intentional homicide. The court sentenced D to a six-year prison sentence. The court did not waste many words on explicating its judgment. The court ascertained that shortly before the collision the Porsche had been driving at high speed, that two red lights had been crossed, that dangerous overtaking manoeuvres had occurred and that D had consumed alcoholic beverages just prior to the collision. The court subsequently held that conditional intent with regard to the death of "other road users" could be inferred from the fact that D had participated in traffic "in the aforementioned manner".

D appealed to the Supreme Court. The well-known attorney Spong argued on D's behalf that the decision should be quashed on the basis of Remmelink's influential view. The core of Remmelink's volitionist view, which was articulated in Section 9.2.5, can be represented as follows.

> In conditional intent the volitional element is completely present; the cognitive element, however, is diluted to a mere realization of the possibility of a result. In conscious negligence, the cognition is the same, but the volitional element lacks completely.[33]

Spong argued that accepting conditional intent, especially the volitional element thereof in traffic tragedies such as these, is difficult to reconcile with D's presumed will to live. Subsequently, he insisted that the question of whether the volitional element of conditional intent is fulfilled should not depend so much on conduct that occurred ten minutes before the collision. Instead, the conduct that occurred during or immediately before the collision should be paramount.

In criminal cases, the Supreme Court is provided with an independent advisory opinion by an advocate general. Meijers, the advocate general in the Porsche case, strongly disagreed with Spong, sympathizing instead with Peters's normativist view.[34] According to Meijers, all factors taken into account by the Court of Appeal, even those that were manifested at an earlier stage, are pertinent. These factors betray an attitude of cynically and ruthlessly putting up with serious consequences that may be expected on a busy road. In Meijers's view, this attitude should be labelled as intent in the context of criminal law. This is justified in light

33 Remmelink 1996, p. 205.
34 *See* Section 9.2.5.

of societal considerations that have to do with oppression and with both special and general prevention.

The Supreme Court reached a different conclusion. The Court started out by stating in general that a road user acts with conditional intent if he "consciously accepts the substantial chance that others will die", rather than "counting on a good outcome". The Supreme Court then ruled that proof of intent in the case at hand was insufficiently motivated.

> 5.4 In cases such as the present one, where the evidence leads one to infer that the defendant by his conduct caused substantial danger for his own life as well, the court must, however, take into account that it is – absent indications to the contrary – not likely according to rules of general experience that the defendant will also accept the substantial chance that a head-on collision with an oncoming car will occur, as a result of which he will die himself.
> 5.5 In light of the aforementioned and taking into account that the evidence indicates that the defendant – apparently to avoid a collision – aborted several overtaking manoeuvres before [...] completing the fatal overtaking manoeuvre, which indicates that the aforementioned manoeuvre, at least in the defendant's imagination and expectation would not result in a collision, [...] the finding that the defendant's intent was directed at the death of the victims stands in need of further motivation.

The cornerstone of this judgment is formed by the assumption that it is not likely that D would have accepted the substantial chance of his own death. The Supreme Court quashed the decision and referred the case to the Arnhem Court of Appeal. It should be noted that a ruling that a verdict is insufficiently motivated does not necessarily entail that it is impossible to convict. The court is required to re-examine the case in light of the Supreme Court's ruling. If it cannot properly motivate a finding of intent, then it will have to acquit.

This is what happened in the Porsche case.[35] D was convicted of negligent homicide in traffic instead, although the court felt that the applicable maximum penalties of the Road Traffic Act could not do justice to the societal need for punishment. The maximum penalty in this particular case was four years' imprisonment. However, D could only be sentenced to three years and eight months of imprisonment on account of a previously imposed punishment for another offence. Under current law, the Road Traffic Act would probably allow for a maximum punishment of twelve years' imprisonment (a combination of recklessness, an aggravating factor such as drink-driving and the fact that multiple deaths were caused).[36]

9.2.8 Conclusion

This section has provided some relevant background information on the interpretation of intent in relation to dangerous behaviour in traffic. As it turns out, it is

35 *See* Arnhem Court of Appeal 10 March 1997, ECLI:NL:GHARN:1997:AJ6387.
36 *See* Section 9.2.3.

far from clear how the elusive concept of conditional intent is to be interpreted. It appears that the cognitivist and the volitionist theory are the best candidates to explain the Supreme Court's case law on intent. In Section 9.3, I argue for a cognitivist interpretation of intent on the basis of the Porsche case. Section 9.4 examines several volitionist theories that pertain to the boundary between conditional intent and conscious negligence.

9.3 A Cognitivist Analysis of the Porsche Case

9.3.1 Introduction

The generally accepted academic view is that the Supreme Court emphasized the volitional element of intent in the Porsche case.[37] This claim is to be understood against the background of an exclusive volitionist distinction between conditional intent and conscious negligence. This entails that the cognitive element in conscious negligence is fulfilled, but that the volitional element is not fulfilled ('knowing' + 'not wanting'). This interpretation of the Supreme Court's judgment accords with the argument that was brought forward by D's attorney Spong. He had argued, on the basis of Remmelink's volitionist view, that the volitional element of intent is difficult to reconcile with D's presumed will to live.

The generally accepted academic construal of this case seems to be based on a simple piece of reasoning. First, the Supreme Court's assumption that D did not want to kill himself and others is more or less automatically tied to the absence of the volitional element of intent. Second, it is more or less automatically assumed that the cognitive element of intent must have been fulfilled. Thus, the case fits nicely into the mould of the volitionist theory ('knowing' + 'not wanting').

In this section, I will argue against these premises. The automatic connection between the Supreme Court's speculations about D's volitions and the volitional element of intent is called into question. Instead, I will argue that the speculations about D's volitions are but a means to say something about the cognitive element. In this view, the Porsche case fits just as well into the mould of the cognitivist theory.

I will clarify my view by elaborating on four assumptions, which might explain the Porsche case: (1) self-preservation assumption; (2) danger perception assumption; (3) rationality assumption; and (4) non-awareness assumption. In the process, I introduce a psychological framework (Desirability Maximization Theory) that may be applicable to other traffic cases as well.

37 *See* 't Hart 1997; Wedzinga 1997, p. 501; De Jong 1999, p. 4; Wolswijk 2000, pp. 800 and 804-805; De Jong & Knigge 2003, p. 109; De Hullu 2012, p. 240; Harteveld & Robroek 2012, p. 70; Machielse 2013, note 3.3 on 'opzet'. *See also* Wolswijk, this book, Section 2.3.2.

9.3.2 Self-Preservation Assumption

1. D did not want to die.

The Supreme Court ruling can be plausibly explained by the self-preservation assumption. This assumption holds that human behaviour is generally directed towards self-preservation. The self-preservation assumption is a plausible psychological assumption.[38] Some psychologists even go so far as to claim that the self-preservation instinct – the goal of staying alive – is the superordinate goal towards which *all behaviour* is oriented.[39] Such a sweeping claim is difficult to reconcile with risky road behaviour, however.[40] The weaker self-preservation assumption that is appealed to here only holds that people generally have a very strong desire to stay alive. The anticipation that certain behaviour might well result in their own death provides a strong motivation not to act.

Due to the omnipresent character of the self-preservation instinct, the assumption can be made regardless of the case at hand. The Supreme Court did, however, find additional support in the fact that D had aborted several overtaking manoeuvres. According to the Court, D apparently did this to avoid a collision. This is evidence for the validity of the self-preservation assumption in this particular case: it can be inferred that his behaviour shortly before the collision was not directed towards causing a collision and killing himself. It might be added that there is also evidence with respect to a later stage. Braking is the most natural collision avoidance manoeuvre.[41] The braking manoeuvre shows that D did not want to cause a collision at that time as well.[42]

9.3.3 Danger Perception Assumption

2a. If there is a substantial chance of V dying, there is also a significant chance of D dying.
2b. If D had been aware of the substantial chance of V's death, he would also have been aware of a significant chance of his own death.

The danger perception assumption has an objective component (2a) and a subjective component (2b). The objective component deals with the relation between the objective chance of V's death and the objective chance of D's death. The term 'objective' is meant to convey that it does not refer to D's estimation of the chance,

38 *See* Karni & Schmeidler 1986; Muraven & Baumeister 1997. *See* for a similar argument in a legal context: Grass 1983-1984, p. 512.
39 *See* Pyszczynski, Greenberg & Solomon 1997, p. 5.
40 *But see* Taubman Ben-Ari, Florian & Mikulincer 1999, claiming that risky driving may accord with the self-preservation principle, because it serves as a symbolic means to protect oneself from the awareness of one's finitude.
41 *See* Markkula *et al.* 2012, p. 1120.
42 The Court of Appeal did not mention the braking manoeuvre. This explains why the Supreme Court did not use this argument.

which is termed the 'subjective chance'.[43] The subjective component is about the relation between the subjective chance of V's death and the subjective chance of D's own death.

What can we say about the objective chance of death for V and D? The end state of the Porsche case was a head-on collision between a Porsche 928s and a Volvo 340 DL. Since the Porsche is built for speed and is much heavier than the Volvo, the collision may have been much more dangerous to the occupants of the Volvo than to D.[44] However, a high-speed head-on collision seems to be rather dangerous, even if one is driving a Porsche. If there is a *substantial* chance of V dying, there must at least have been a *significant* chance of D dying.

The subjective component deals with the relation between a mental state that is required for proof of intent (awareness of a substantial chance of V's death) and his estimation with respect to the chance of his own death. If D had been aware of the *substantial* chance of V's death, it is highly likely that he would also have been aware of a *significant* chance of his own death. This conclusion may be strengthened by taking self-preservation into account. From a self-preservation perspective, it is more important to recognize danger to oneself than danger to non-related others. From an evolutionary perspective, it may even be beneficial to overestimate danger to oneself, because it is better to err on the safe side.[45] The cost of overestimating danger is much less than the cost of underestimating danger, since one mistake can already be fatal. All in all, it is hard to imagine that the necessary condition for intent is fulfilled (awareness of lethal danger to others) whilst D has not perceived significant danger to himself.

The abovementioned argument takes the Volvo's occupants as a reference point. It is to be noted, however, that the Porsche's other occupant also died and that homicidal intent with regard to him was also established by the Court of Appeal. The death of the other occupant underscores the dangerousness of this collision. Furthermore, it is even more difficult to fathom that D had been aware of the substantial chance of his friend's death whilst not having been aware of the (almost) equal chance of his own death.

9.3.4 Rationality Assumption: Desirability Maximization Theory

3a. The option involving a significant chance of his own death would be less desirable to D than other options.
3b. D would not opt for the least desirable option.
3c. Thus, D would not act whilst being aware of a significant chance of his own death.

43 In the legal context, a so-called 'objective chance' is still subjective in nature because it is based on an informed probability estimation of a certain event. This might be labelled as an 'inter-subjective chance'. *See* Gillies 2000, pp. 169-186. *See also* Van Dijk 2008, pp. 391-394.

44 *See* Evans 1994. The heavier car will drive the lighter car backwards. Occupants of the lighter car will therefore experience higher decelerations.

45 *See* Gilbert 1998. Otte 2001, p. 11, argues the opposite for the Porsche case. In his view, it is very difficult to imagine one's own death.

Desirability Maximization Theory

According to the causal theory of action, intentional conduct is caused (in the right way) by beliefs and desires.[46] The fact that someone goes to the store to buy a computer can be causally explained by one's desire to buy a computer and one's belief that this computer can be bought there. In a forthcoming book, I will argue that the most convincing psychological account of action is given by what I call Desirability Maximization Theory.[47] This theory is a more precise, decision-theoretic version of the causal theory of action.

The first aspect of this theory involves the desirability maximization thesis. If someone can choose between multiple options, he will always choose the option that is more desirable than (or at least as desirable as) any other option open to him.[48]

The second aspect of this theory specifies how someone determines the desirability of possibilities and options. An *option* (overtaking) may have several *possibilities* (possibility 1: collision; possibility 2: no collision). The desirability of a possibility is determined by two factors: conviction and appreciation. The *conviction* is a determination of the probability of the possibility. The *appreciation* is a determination of how much the possibility is valued. I submit that it is possible to assign numbers to convictions and appreciations. The numbers designate the strength of these mental states.

The *conviction grade* (conviction) is an expression of the belief state. The conviction grade is modelled after the scale that is used to express objective probabilities. Someone who is fully convinced that Φ will happen has a conviction grade of 1 (100%) with regard to Φ. Someone who is fully unconvinced that Φ will happen or is fully convinced that Φ will not happen has a conviction grade of 0 (0%) with regard to Φ. Someone who is equally convinced that the mutually exclusive and exhaustive possibilities Φ and not-Φ (e.g. head or tail) will happen has a conviction grade of 0.50 (50%) with regard to Φ. These three reference points are the most straightforward. It is, of course, also possible to assign numbers to intermediate convictions.

The *appreciation grade* (appreciation) is an expression of the desire state. The appreciation grade is expressed on an arbitrary scale between -100 (maximum negative appreciation) and 100 (maximum positive appreciation). An appreciation grade of 0 means that someone is indifferent with regard to the possibility. The

46 *See* Davidson 1980, pp. 3-19; Mele 1992; Moore 1993.

47 Desirability Maximization Theory is a subjective, psychological version of Expected Value Theory. It must be distinguished from Subjective Expected Utility Theory (Savage 1954). The latter rational choice theory is not a psychological theory. It is a behaviouristically inspired mathematical theory about the representation of subjective probabilities and utilities. Its function is primarily normative: detecting inconsistencies between different choices. Desirability Maximization Theory aims to be descriptive and predictive. *See* for similar psychological theories: Mellers & McGraw 2001; Ajzen & Fishbein 2008; Weiss, Weiss & Edwards 2009. The forthcoming book about Desirability Maximization Theory will be published after the previously mentioned other forthcoming book, which is an extended version of the present contribution.

48 This thesis accords with Davidson's well-known principle P1. Davidson 1980, p. 23: "If an agent wants to do *x* more than he wants to do *y* and he believes himself free to do either *x* or *y*, then he will intentionally do *x* if he does either *x* or *y* intentionally."

other numbers have no meaning by themselves, but say something about the relative level of appreciation.[49] An appreciation grade of 8 is twice as high as an appreciation grade of 4. Furthermore, a negative appreciation can be cancelled out by a positive appreciation of the same strength. Thus, an appreciation grade of 5 with regard to winning 100 euros if a coin comes up heads and an appreciation grade of -5 as to losing 70 euros if a coin comes up tails add up to 0.[50]

The central tenet of Desirability Maximization Theory is that the *desirability* of a possibility is determined by multiplying the conviction grade by the appreciation grade. Both the appreciation grade and the desirability are expressions of the desire state. The desirability can be positive, neutral (0) and negative as well. If an option has multiple possibilities, the desirabilities must be added together. This leads to the overall desirability of the option. The desirability of the option can then be compared to the desirability of other options. The option with the highest desirability is chosen (desirability maximization thesis). The theory can be represented as follows.

$$D = C_1 \times A_1 + C_2 \times A_2 + \ldots + C_n \times A_n$$

D desirability of the option
C_1 conviction grade with regard to possibility 1
A_1 appreciation grade with regard to possibility 1

Application to the Porsche Case

I illustrate the theory by applying it to the Porsche case. The relevant question here is how much the option of overtaking is desired compared to the option of not overtaking. Let us assume that the desirability of not overtaking is 0. That means that D will overtake if the total desirability of the option of overtaking is positive. Let us further assume that D has a conviction grade of 0.50 with regard to the possibility that the overtaking manoeuvre will kill himself. On account of the self-preservation assumption, this possibility must be extremely negatively appreciated (e.g. -80). According to Desirability Maximization Theory, the desirability of this possibility is -40 (0.50 × -80). The option of overtaking can only have a positive desirability if the possibility of a successful overtaking manoeuvre is extremely highly appreciated. Assuming that D's conviction grade with regard to a successful overtaking manoeuvre is also 0.50,[51] his appreciation of this possibility should be higher than 80 (e.g. 90). This is pictured in Tables 9.2 and 9.3.

49 It is submitted that the appreciation grade can be expressed on a ratio scale. *See*, *e.g.*, Davis 1980.

50 This example conveys that losing money generally has a greater impact than winning money (loss aversion). *See*, *e.g.*, Tversky & Kahneman 1991.

51 It is assumed that the conviction grades with regard to the mutually exclusive and exhaustive possibilities sum to 1 (additivity).

Table 9.2 Desirabilities of Possibilities

Possibility	Desirability	Conviction	Appreciation
Killing oneself	0.50 × -80 = -40	0.50	-80
Successful overtaking	0.50 × 90 = 45	0.50	90
Not overtaking	0		

Table 9.3 Desirabilities of Options

Option	Total desirability
Overtaking	-40 + 45 = 5
Not overtaking	0

Table 9.3 indicates that the total desirability of the option of overtaking (5) is higher than the desirability of not overtaking (0). This means that D will elect to overtake the other car.

The numbers required to induce D to overtake raise serious questions. A desire to experience thrill and adventure can certainly motivate some drivers to take risks.[52] It is hard to imagine, however, that the possibility of thrill seeking is so much appreciated that the possibility of killing oneself is outweighed. This accords with research indicating that thrill seekers who behave risky do not perceive this as such themselves.[53] This means that the objective risk may be much higher than the subjective risk (conviction grade).

A positive desirability for the option of overtaking can only be plausibly obtained by assuming that the conviction grade for the possibility of killing oneself is substantially lower. This entails that the conviction grade for the other possibility of successfully overtaking will be substantially higher. A conviction grade of 0.10 as to killing oneself goes together with a conviction grade of 0.90 for a successful overtaking manoeuvre.[54] In that case, an appreciation grade of just 9 with regard to a successful overtaking manoeuvre (desirability = 0.90 × 9 = 8.1) is sufficient to outweigh the negative desirability of killing oneself (desirability = 0.10 × -80 = -8). This is somewhat less implausible, but it is still hard to imagine that trivial motives such as thrill seeking are so much appreciated.

It is, of course, possible to attribute a much lower conviction grade to D. It is to be noted, however, that the conviction grade with respect to killing oneself is connected to the conviction grade with respect to killing others via the danger perception assumption (*see* Section 9.3.3). If D had been aware of the *substantial* chance of V's death (as is required for proof of intent), he would also have been

52 *See* Rothengatter 1988; Jonah 1997; Harris & Houston 2010.

53 Heino, Van der Molen & Wilde 1996, p. 78, state that the term 'willingness to take risks' may be inappropriate. "Sensation seekers, as compared to sensation avoiders, do not evaluate their behaviour as being more risky. Therefore it can not be said that they take more risk deliberately."

54 It is assumed that the conviction grades (0.10 and 0.90) with regard to the mutually exclusive and exhaustive possibilities sum to 1 (additivity).

aware of a *significant* chance of his own death. Thus, in applying Desirability Maximization Theory here, we must assume the chance of D's own death to be at least significant. If the conviction grade for one's own death gets so small as to seriously reduce the negative desirability of killing oneself (e.g. 0.01 × -80 = -0.80), this is unlikely to go together with the required awareness of a substantial chance of another person's death.

Desirability Maximization Theory aims to predict behaviour on the basis of underlying mental states. In this case, however, it is used to demonstrate that certain behaviour cannot be plausibly explained by a mental state (awareness of one's own death) that is thought to be connected to homicidal intent. Three assumptions are required.

3a. The option involving a significant chance of his own death would be less desirable to D than other options.
3b. D would not opt for the least desirable option.
3c. Thus, D would not act whilst being aware of a significant chance of his own death.

Assumption 3a has been demonstrated above. It is phrased in the conditional tense to convey that D did not actually make this determination. To get from the *preference* assumption 3a to *action* assumption 3c, we need auxiliary assumption 3b. Assumption 3b is based on the desirability maximization thesis: someone will always choose the option that is more desirable than (or at least as desirable as) any other option open to him. If this connection between preference and action is accepted, it follows that D would not overtake whilst being aware of a significant chance of his own death.

Applicable in Practice?

Desirability Maximization Theory is a rational theory of choice. The theory appeals to a rather thin notion of rationality.[55] The beliefs (conviction grade) and desires (appreciation grade) that form the reasons for action are left unexamined. Conduct is still regarded as rational if a reasonable person in the actor's position would have had different beliefs or desires. Rationality is solely determined on the basis of a given set of beliefs and desires. Desirability Maximization Theory holds that convictions and appreciations are mentally integrated to form desirabilities, which in turn form the basis for the maximization of desirability. If convictions and appreciations are integrated correctly and if the option with the highest desirability is acted upon, the action is regarded as rational.[56]

55 *See* Elster 1983, pp. 1-15, about thin theories of rationality.

56 It is important to note that the oft-cited finding by Kahneman & Tversky 1979 that people systematically violate the axioms of Expected Utility Theory does not affect Desirability Maximization Theory. These findings pertain to consistency between choices, whereas Desirability Maximization Theory is about unique choices. Kahneman and Tversky's research programme on biases and heuristics has unfortunately instilled a widespread belief that humans are prone to make irrational decisions.

The question can be raised whether people are actually capable of performing the complex mental arithmetic that the theory seems to require. I cannot address this question thoroughly here, but I submit that the theory has sufficient descriptive power. I briefly address two important aspects. First, it is not implied that people actually have numbers in their heads. The theory only holds that the strength of beliefs and desires can be represented by numbers. Such numbers could in principle be elicited via psychological procedures.[57] Second, it is not implied that mental arithmetic actually takes place. The multiplicative integration of convictions and appreciations (C × A) takes place by means of an intuitive fractionation strategy.[58] The output variable (desirability) is located on the same dimension as the required input variable (appreciation). The appreciation grade is simply adjusted in proportion to the conviction grade.

The claim made here is that humans implicitly act in accordance with Desirability Maximization Theory. This means that even people with no formal knowledge about probability theory are expected to conform to these rules.[59] It is, of course, not claimed that people conform perfectly to the theory. People are bound to make mistakes in the mental integration of convictions, appreciations and desirabilities. This might lead to a 'wrong preference': someone prefers (and acts upon) an option he should not have preferred based on his underlying convictions and appreciations. It is submitted, however, that the theory is good enough to be used in practice. This is especially so if the theory is applied to clear-cut cases like the Porsche case. If the negative desirability of one possibility (getting killed oneself) is so high that it can hardly be outweighed, the margin for error is quite large. Thus, even rather substantial calculation errors would still lead to the 'right preference': i.e. not overtaking is more desirable than overtaking.

Even if it is accepted that people more or less conform to Desirability Maximization Theory, the question remains how it can be applied to legal cases. In criminal cases, the *actus reus* is usually quite clear, but it is often unclear what mental states, if any, explain D's conduct. Applying Desirability Maximization Theory to a case basically requires solving an equation with an unknown number of variables (what options and possibilities were considered?) with unknown values (conviction grade; appreciation grade; desirability).

With respect to the number of options and possibilities, it is submitted that human beings tend to consider a relatively small number in order to make a decision.[60] Due to a limited processing capacity, humans will only focus on salient options and possibilities. The serious consequences that are relevant in the legal context (e.g. death or injury) are bound to have a large impact in decision making *if* they are considered by the actor. When one tries to reconstruct the decision making process, it is, therefore, generally acceptable to limit the representation of convictions and appreciations to just a few important options and possibilities.

57 *See, e.g.*, Von Winterfeldt & Edwards 1986.
58 *See* Lopes & Ekberg 1980.
59 *See, e.g.*, Schlottmann 2001 about expected value judgments of five-year-old children.
60 *See* Ajzen & Fishbein 2008; Weiss, Weiss & Edwards 2009.

With respect to the unknown values of the convictions and appreciations that are represented, it is pointed out that Desirability Maximization Theory is primarily meant as a tool to structure the discussion. It is generally not required to actually assign numbers. In the Porsche case, for instance, it could be easily ascertained that the mental state required for homicidal intent is hardly reconcilable with any conviction grade for D's own death.

The main insight from Desirability Maximization Theory is that the desirability of a consequence is contingent on the anticipated likelihood of that consequence. In some cases, this insight might be used to demonstrate that unwanted consequences need not deter people from acting if the consequence is deemed less likely. This is especially so if the consequence is not as negatively appreciated as the loss of one's own life. The prospect of causing death or injury to others provides an example. Such a prospect is generally negatively appreciated, either intrinsically or because it might lead to other unwanted consequences such as criminal liability.[61] A low conviction grade may explain why options involving the possibility of such an unwanted consequence may be preferred nonetheless. It must be borne in mind, however, that the conviction grade must be high enough to qualify as a 'substantial chance'. For the purposes of discussion, I shall assume in this contribution that the lower boundary can be set at 10%.[62] Such a conviction grade (0.10) leads to a tenfold decrease of the prospect's undesirability. Thus, a 10% chance of an unwanted result, such as injuring a police officer who is trying to stop a suspect's car, might be accepted in order to abscond.[63]

Desirability Maximization Theory as a Discussion Tool

Desirability Maximization Theory can also serve as a tool to structure the scholarly debate about intent. It is exceptionally difficult to debate the meaning of intent on the basis of actual case law. I mention three reasons. First, people often do not agree on how the facts of a case should be evaluated. This is especially so in case of mental states. Second, these differences often remain implicit, because it is very difficult to express in words how multiple relevant mental states in a case relate to each other. Third, the discussion is more or less confined to situations that happened to surface in case law.

The framework offered by Desirability Maximization Theory makes it possible to postulate numbers for the purposes of discussion. Every possible situation can be precisely simulated on the basis of postulated numbers. This makes it possible to discuss all kinds of interesting doctrinal questions. What conviction grade suffices for intent? Does a negative appreciation grade as to the result negate intent? Can a low conviction grade for a result be compensated by a high appreciation grade for that result?

61 *See further* Section 9.5.

62 *See* De Hullu 2003, p. 237; Van Dijk 2008, p. 405.

63 *See further* Section 9.3.7. This does not amount to conditional intent in some volitionist views, however. This is the case if Desirability Maximization Theory predicts that D *would* not act if he had been more certain. *See* Section 9.4.3 on 'counterfactual what-if desires'.

In this contribution, I will focus on one aspect of the intent debate. I will sometimes postulate numbers to elucidate how the cognitivist and volitionist theory might differ. It is hoped that this can contribute to a clearer understanding of how substantive law should be interpreted.

9.3.5 Non-Awareness Assumption

1. D did not want to die.

2a. If there is a substantial chance of V dying, there is also a significant chance of D dying.
2b. If D had been aware of the substantial chance of V's death, he would also have been aware of a significant chance of his own death.

3a. The option involving a significant chance of his own death would be less desirable to D than other options.
3b. D would not opt for the least desirable option.
3c. Thus, D would not act whilst being aware of a significant chance of his own death.

4. D has not been aware of the substantial chance of another person's death.

The final assumption in the Porsche case is that D has not been aware of the substantial chance of another person's death whilst overtaking. This non-awareness assumption (4) follows logically from the truth of the self-preservation assumption (1), danger perception assumption (2) and rationality assumption (3). The requisite condition of intent – D acted whilst being aware of the substantial chance of another person's death – can only be established if one of the following three alternative assumptions is accepted.

1'. D wanted to die or was indifferent to the prospect of dying.
2'. D failed to perceive that a substantial chance of V's death implied a significant chance of his own death.
3'. D chose the least desirable option.

Assumption 3' directly contradicts the desirability maximization thesis. Abandoning this thesis comes at the price of rendering human action completely unintelligible. Rejecting this thesis in the legal context is not a viable option.[64]

Assumptions 1' and 2' are not in conflict with Desirability Maximization Theory. In the first case, D has a positive appreciation grade, a zero appreciation grade or only a low negative appreciation grade with regard to his own demise. In the second case, D has a low conviction grade as to the possibility of his own

64 *See* for a philosophical rejection: Clarke 1994; Gert 2005. Even if the rejection is valid, it is to be expected that people would only in exceptional cases violate the desirability maximization thesis. Thus, the alternative assumption is still not a plausible evidentiary assumption.

death. In both cases, the option of overtaking may have the highest desirability, because the prospect of one's own death does not have a large impact. It is to be noted, however, that it must further be assumed that the actor is rather indifferent to the prospect of killing others.[65] Although this assumption is less implausible than the assumption that someone is indifferent to his own life, it is still a rather bold assumption to make.[66]

Assumptions 1' and 2' might be true, but they are *prima facie* implausible. The Court of Appeal's verdict that was challenged before the Supreme Court contained no evidence with respect to the veracity of these assumptions. Thus, the Supreme Court was right to quash the conviction. The Arnhem Court of Appeal, to which the Porsche case was referred, held that it could not provide an adequate motivation for a finding of intent.[67] It seems plausible, therefore, that there was no evidence to support these alternative assumptions.

9.3.6 The Upshot of the Porsche Case: The Cognitive Element Is Not Fulfilled

The self-preservation assumption – i.e. the assumption that D did not want to die – lies at the heart of the Supreme Court's ruling. The Court made clear that this evidentiary assumption is rebuttable: "absent indications to the contrary". Although the central assumption is evidentiary in nature, the ruling does have implications for substantive law. The psychological assumptions and the mental terms used to delineate intent imply that the Supreme Court sympathizes with a psychological theory of intent. This raises the question of which of the two psychological theories of intent best explains this ruling.[68]

The generally accepted academic view is that the Supreme Court emphasized the volitional element of intent in the Porsche case.[69] This entails that the case fits perfectly into the mould of the volitionist theory, in which the distinction between intent and negligence revolves exclusively around the volitional element. Conditional intent entails 'knowing' and 'wanting', whereas conscious negligence entails 'knowing' and 'not wanting'. Thus, the cognitive element is fulfilled, but the volitional element is not fulfilled because D did not want to kill anyone.

The volitionist characterization of the Porsche case has all the hallmarks of a knee-jerk response. The starting point of this response is the assumption with regard to D's volitions. This *evidentiary* assumption is more or less automatically connected to the volitional element of intent – a *substantive* law requirement. Simply put, D did not want to kill himself and others; *ergo*, the volitional element is not fulfilled. This knee-jerk response is followed by a second one. It is more or

65 In order to prove intent, the actor must at least be aware of the substantial chance of another person's death. This means that the conviction grade with respect to another person's death cannot be that low.

66 *See further* Section 9.5.

67 Arnhem Court of Appeal 10 March 1997, ECLI:NL:GHARN:1997:AJ6387.

68 It is noted that the Supreme Court does not explicitly reject the normativist theory of intent. It is fair to say, however, that the volitionist and cognitivist theory are the most promising candidates to explain the Supreme Court's view. *See also* Section 9.2.6.

69 *See* Section 9.3.1.

less automatically assumed that the cognitive element must have been fulfilled, so that this is a case of conscious negligence.

I disagree with the dominant interpretation of the Porsche case. If the Supreme Court does indeed say something pertinent with regard to the concept of intent, it is about the importance of cognition. The speculations about D's volitions (self-preservation assumption) are only a means to enable an inference with respect to D's cognition (non-awareness assumption). The volitions are used in an evidentiary manner, whereas the ensuing inference about cognition is relevant to the concept of intent.

This cognitivist interpretation finds support in the Supreme Court's dictum, which was quoted in Section 9.2.7. The Court explicitly holds that the unlikeliness of D accepting the substantial chance of his own death and the aborted overtaking manoeuvres indicate that the fatal overtaking manoeuvre "in the defendant's imagination and expectation would not result in a collision". This leads the Supreme Court to conclude that the Court of Appeal's verdict was insufficiently motivated.

The conclusion is that the non-awareness assumption – the assumption that D did not *imagine* or *expect* a collision – stands in the way of proof of intent according to the Supreme Court. Since the terms 'imagination' and 'expectation' clearly refer to cognitive mental states, it seems logical to conclude that this pertains to the cognitive element of intent. If D did not *imagine* or *expect* a collision, it seems plausible that he also did not *imagine* or *expect* to kill other people. Thus, the cognitive element of intent is not fulfilled.

9.3.7 The Analytical Connection between the Cognitive and Volitional Element

According to the cognitivist theory, the volitional element is analytically dependent on the cognitive element.[70] If the cognitive element is fulfilled (awareness of a substantial chance), the volitional element is necessarily fulfilled as well. If the cognitive element is negated (no awareness of a substantial chance), the volitional element is necessarily negated as well. The volitionist characterization of conscious negligence ('knowing' + 'not wanting') is almost regarded as a crime against logic. This section addresses the question of why 'wanting' might be contingent on 'knowing'.

The dependency thesis can be explained on the basis of Desirability Maximization Theory. According to this theory, the substantial chance of a result is part of an option that is more desirable than (or at least as desirable as) any other option open to the actor. The fact that there is no option available to the actor with a higher desirability necessarily qualifies as 'wanting'. Of course, the actor could hope for the result not to happen, but since this hope does not induce the actor to choose otherwise, this is not enough to qualify it as 'not wanting'.

70 *See* Section 9.2.5.

This can be illustrated as follows. Assume that D, a wanted criminal, receives a stop signal from a police officer. In her mind, D can either continue to drive towards the police officer in the hope that the officer will jump out of the way or she can stop with the consequence that she will be apprehended. This is pictured in Tables 9.4 and 9.5.

Table 9.4 Desirabilities of Possibilities

Possibility	Desirability	Conviction	Appreciation
Escape and kill V	0.10 × -50 = -5	0.10	-50
Escape without killing V	0.90 × 10 = 9	0.90	10
Not escaping	-10		

Table 9.5 Desirabilities of Options

Option	Total desirability
Escaping	-5 + 9 = 4
Not escaping	-10

The numbers displayed in Tables 9.4 and 9.5 indicate that D will continue to drive towards the police officer. This decision is qualified as intent. The substantial chance (10%) to kill V is part of an option (escaping) that has a higher desirability (4) than the option of not escaping (-10). It can still be said that D hopes that the police officer will not be killed. 'Hoping' is manifested by the very negative appreciation grade with respect to the option of killing V in the process of escaping (-50).[71] Since this hope fails to alter D's decision, it is still held that the volitional element is fulfilled. The volitional element is determined on the basis of the relative strength of the desirability (4 > -10), rather than on the basis of the negative appreciation grade as to killing V in the process of escaping (-50).

The second aspect of the dependency thesis is that 'not knowing' implies 'not wanting'. To illustrate this, the abovementioned example can be adapted in two ways. First, let us assume that D is only aware of a non-substantial chance of killing the police officer (e.g. a conviction grade of 0.01). Second, let us assume that D is completely indifferent to the possibility of killing a police officer (an appreciation grade of 0). This means that the desirability of the option of escaping is not influenced in any way by the possibility that the officer might be killed.[72] Tables 9.6 and 9.7 portray the situation.

71 It is noted that this appreciation grade pertains to two connected possibilities (escaping and killing V). It may be assumed that the sole prospect of killing V would be negatively appreciated as well, since the prospect of escaping is positively appreciated.

72 This is why the prospect of 'escaping and killing V' has the same appreciation grade (10) as the prospect of 'escaping without killing V'. The possibility of V's death has no influence.

Table 9.6 Desirabilities of Possibilities

Possibility	Desirability	Conviction	Appreciation
Escape and kill V	0.01 × 10 = 0.10	0.01	10
Escape without killing V	0.99 × 10 = 9.90	0.99	10
Not escaping	-10		

Table 9.7 Desirabilities of Options

Option	Total desirability
Escaping	0.10 + 9.90 = 10
Not escaping	-10

In this example, the option of escaping is even more desirable relative to the option of not escaping. According to the cognitivist theory, the cognitive element is not fulfilled, since D did not act despite awareness of a substantial chance.[73] Thus, the same goes for the volitional element. D can only be said to have accepted a non-substantial chance ($^{1}/_{100}$) of death as part of the package. This volitional act is not sufficient to fulfil the volitional element according to the cognitivist theory.

It is to be noted that this example might lead to the attribution of intent in some volitionist theories, which will be examined in Section 9.4. If conscious awareness of the substantial chance is not required for the cognitive element, the indifference displayed by D might be held to fulfil the volitional element.[74] An important factor in that respect might be that Desirability Maximization Theory predicts that D would also have acted if he had been more certain.

Finally, I will briefly address the question of how the cognitive boundary between intent and negligence is to be justified. Why is acting (or failing to act) despite awareness of the substantial chance necessarily a manifestation of intent? The rationale for this cognitive boundary can be found in the omission to choose for avoidance of the option involving a substantial chance of the result.[75] It is noted that control is required to be part of the actor's intentional object.[76] This entails that he believes that he could choose for a different course of action (putative control). Thus, a train operator who is aware of the substantial chance that his train will drive over someone standing on the rails does not act with conditional intent, since he does not believe he can avoid this chance. The omission to choose other-

73 It is noted that D did not act with direct intent, since she did not act in order to cause the result. It is an open question whether direct intent also requires awareness of a substantial chance. *See* Van Dijk 2008, pp. 363-369, claiming that this is indeed required. *See* Machielse 2013, note 3.5 on 'opzet' for the opposite, generally accepted view.

74 *See also* Section 9.4.6, where it is submitted that something more in the way of volition might be required in a legal system, such as Germany, where the cognitive element does not pertain to a substantial chance.

75 *See* Van Dijk 2008, p. 420.

76 *See* Van Dijk 2008, pp. 380-381 and 418-420.

wise when the actor thought he could do so is a *prima facie*[77] reason for criminal responsibility for intentional offences.

Although this omission to choose differently can be explained by reference to the actor's preferences – i.e. the substantial chance of a result is part of an option that is more desirable than (or at least as desirable as) any other option open to the actor – it is not necessarily the case that the prohibited result is positively appreciated. As a matter of fact, in most cases of conditional intent the result is probably negatively appreciated by the actor. As such, it would be better to abandon the terms 'wanting' and 'volitional element' from the cognitivist vocabulary, as it can only breed confusion.[78]

The justification for requiring a relatively high conviction grade (awareness of a substantial chance) is more difficult to provide. Why should someone who is truly indifferent about causing death profit from the fact that only a non-substantial chance was foreseen? The best answer might be that this question begs the question. The assumption that underlies this question (D is truly indifferent) stands in need of adequate proof. It is generally very difficult to predict with sufficient certainty whether D would *really* act despite a higher conviction grade. Just as the proof of the pudding is in the eating, proof of immorality is in acting despite actual awareness of a substantial chance.

9.3.8 What Can We Say about Volition in the Porsche Case?

In the previous section, it was outlined that the volitional element is contingent on the cognitive element according to the cognitivist theory. The conclusion that the cognitive element in the Porsche case is negated leads therefore automatically to the conclusion that the volitional element is negated as well. This conclusion is based on analytical grounds. It is not necessary to base this on further psychological assumptions.

According to the volitionist theory of intent, 'knowing' and 'wanting' are not analytically connected.[79] Since both elements must be fulfilled to establish conditional intent, a volitionist might opt to assess the volitional element straightaway. If it is not fulfilled, there can be no intent. In the Porsche case, a volitionist might argue that the volitional element is not fulfilled, because D did not accept the death of another person. Does this mean that volitionists could rightfully claim that the Porsche case is about the volitional element after all?

The assumption that D did not accept the death of another person is indeed plausible. I would argue, however, that the non-acceptance assumption follows from the non-awareness assumption. This is not an analytical conclusion, as was the case with respect to the cognitivist theory, but a fallible psychological inference. Someone who does not directly intend to kill another person ordinarily has

77 It is a *prima facie* reason, because justifications and excuses stand in the way of criminal responsibility. In Dutch criminal law, justifications and excuses are determined after the determination of intent.

78 *See* Van Dijk 2008, pp. 428-430.

79 *See* Section 9.2.5.

no reason to speculate about how he appreciates the prospect of causing death. It is only necessary to face up to the acceptance question when someone actually foresees that causing death is a possibility. Thus, if the non-awareness assumption is true, the non-acceptance assumption is probably true as well. It is important to note that this condition of non-acceptance involves the absence of a mental state. It is not a mental act of negative appreciation ('I do not accept this'); there simply is no appreciation act.

This must surely be a disappointing conclusion for volitionists. Is the absence of a volitional mental state, which is inferred from the absence of a cognitive mental state, all we can say about the supposedly all-deciding volitionist criterion that distinguishes conscious negligence from conditional intent? It seems that the Porsche case as such does not allow for saying anything more about the volitionist criterion. All we can say about the volitional element is that there is no evidence for a volitional act with respect to the death of others when D embarked on his final overtaking manoeuvre.

9.4 A Volitionist Analysis of the Porsche Case

9.4.1 Introduction

I have argued that the cognitivist theory of intent gives the most straightforward interpretation of the Porsche case. The most suitable characterization of D is 'not knowing' and 'not wanting'. To explain the Porsche case according to the volitionist theory, one has to argue that this case can be characterized as 'knowing' and 'not wanting'. This approach faces two difficult questions. First, how can the cognitive element be fulfilled when D did not *imagine* or *expect* a collision? Second, is there a criterion for the volitional element that functions independently of the cognitive element so as to create an exclusive volitionist distinction between intent and negligence?

In the following sections, I discuss several possible answers to those questions. Subsequently, I tackle the question of which of these volitionist interpretations provide the best explanation of the Dutch Supreme Court's view. Finally, the interpretation with the most explanatory power is examined in more detail.

9.4.2 The Cognitive Element: Prior Awareness, Minor Awareness or Non-Conscious Awareness?

Introduction

If the Porsche case is regarded as a manifestation of conscious negligence as interpreted by volitionists, this means that the cognitive element of intent must be fulfilled. This raises the question of how the cognitive element can be fulfilled when D did not *imagine* or *expect* a collision. In Section 9.3.6, I argued that not imagining or not expecting the result negates the cognitive element. Thus, the Porsche case can only be regarded as a manifestation of conscious negligence if the cognitive element is interpreted differently. I propose that this might be achieved

by employing the concepts of prior awareness, minor awareness or non-conscious awareness.

Prior Awareness

This approach explores the gap between a partial belief and a full belief. This can be illustrated using Desirability Maximization Theory. Assume that D has a conviction grade of 0.25 for the possibility that overtaking will result in a collision killing V and a conviction grade of 0.75 as to a successful overtaking manoeuvre.[80] Since a high-speed head-on collision is extremely dangerous to himself, Desirability Maximization Theory predicts that D would not overtake.

A less sophisticated psychological theory might hold that humans convert this graded judgment into a dichotomous judgment before making a decision.[81] According to this psychological theory, the most probable prospect is elevated to the level of a full belief. Since the probability of not colliding (75%) is perceived to be larger than the probability of colliding (25%), this would give rise to the belief that a collision will not happen. Such an all or nothing judgment is tantamount to a conviction grade of 0 with respect to the prospect of a collision. Once D judges that no collision will occur, there is nothing to stop him from acting.

This scenario can be explored by using prior awareness (a conviction grade of 0.25) for the cognitive element, rather than the later dichotomous judgment that induced D to overtake. Thus, the cognitive element is fulfilled because D has – at least at some point – been aware of the substantial chance of a lethal collision.

The convergence heuristic might provide adequate results in many situations, but it is not a good heuristic in dangerous traffic situations. The convergence of a conviction grade as to the prospect that an accident will occur into the full belief that nothing will happen makes no sense from a self-preservation perspective, because it involves ignoring information that is highly relevant to survival.[82]

Minor Awareness

This approach drops the requirement that D must be aware of a *substantial* chance.[83] This approach may even be congruent with Desirability Maximization Theory. The negative desirability of a non-substantial chance of a lethal collision may be outweighed by the positive desirability of the other possibility – a successful overtaking manoeuvre – that is deemed to happen with near certainty. This is pictured in Tables 9.8 and 9.9.

80 It is further assumed that 25% is a 'substantial chance' as is required for conditional intent.

81 This may explain Remmelink's view with regard to conscious negligence: "This may be the case with a driver who drives at high speed through a busy street to catch his train. The possibility of a collision flashes through his mind, but is pushed back by the consideration that he has often done this without causing accidents". *See* Remmelink 1996, p. 205.

82 In Section 9.3.3, it was argued that it is preferable to overestimate danger to oneself, because it is better to err on the safe side. The convergence heuristic has the effect of severely underestimating danger.

83 *See* for this view Machielse 2013, note 3.5 on 'opzet'. *See also* Blomsma 2012, pp. 112-115.

Table 9.8 Desirabilities of Possibilities

Possibility	Desirability	Conviction	Appreciation
Killing oneself and others	0.01 × -80 = -0.80	0.01	-80
Successful overtaking	0.99 × 1 = 0.99	0.99	1
Not overtaking	0		

Table 9.9 Desirabilities of Options

Option	Total desirability
Overtaking	-0.80 + 0.99 = 0.19
Not overtaking	0

In this example, an appreciation grade of just 1 as to a successful overtaking manoeuvre is sufficient to induce the actor to overtake. The actor accepts the non-substantial chance ($^{1}/_{100}$) of killing others, because it is part of a package with an overall positive desirability. In this example, D also accepts the non-substantial chance of his own demise.

Strictly speaking, one cannot employ the Supreme Court's phrase that overtaking "in the defendant's imagination and expectation would not result in a collision". However, in common parlance phrases like 'expecting that not' or 'not expecting that' might also refer to conviction grades slightly above 0.[84] Thus, the minor awareness approach might be congruent with the Supreme Court's characterization of D's mental state.

It must be admitted that these word games are somewhat confusing, because the low conviction grade is characterized as 'knowing' in the context of the cognitive element and as 'expecting that not' in what must be another context. This comes down to the following: D *knows* that he might cause an accident, but he does *not expect* it. The first characterization focusses on the fact that there is some level of awareness, whereas the second characterization elevates the most probable prospect (not causing an accident) to the level of a full belief. Both conversions are part of the linguistic process of describing D's mental state.

Non-Conscious Awareness

This approach drops the requirement that D must be *consciously* aware of a substantial chance.[85] It is helpful to employ a distinction that is made by Duff. He distinguishes three categories of knowledge: explicit knowledge, tacit knowledge and latent knowledge.[86]

84 The same occurs in the higher regions. Legal terms like 'knowingly' (oblique intent) are usually taken to refer to 'virtual certainty'. *See* Blomsma 2012, pp. 72-73. The same reasoning can be applied to the phrase the Supreme Court commonly uses to designate conscious negligence: "assumed that the result would not occur". *See* Section 9.4.5.

85 *See* for this view Knigge 2009, claiming that non-conscious 'wanting' and 'knowing' ought to have a role in determining intent.

86 Duff 1983. *See also* Shute 2002.

Explicit knowledge involves a conscious mental process. This occurs when someone consciously contemplates a specific risk. The other two kinds of knowledge are of a non-conscious nature. *Tacit knowledge* guides a person's actions, although he is not consciously aware of it. One might say that his knowledge of a specific risk is suppressed or subconscious. *Latent knowledge* might be described as a person's knowledge of 'risks in general', which would make him explicitly or tacitly aware of the specific risk if he attended properly to the situation. Latent knowledge is some kind of background knowledge that makes someone capable of explicitly or tacitly noticing a specific risk.

In my view, the cognitive element of intent requires explicit knowledge: conscious awareness of a substantial chance of another person's death. I take it that the Supreme Court's phrase that overtaking "in the defendant's imagination and expectation would not result in a collision" refers to explicit knowledge. Thus, in my view, the cognitive element is negated.

Adherents of the volitionist theory might invoke the concepts of tacit and latent knowledge to argue that the cognitive element is fulfilled after all.[87] They might hold that D was subconsciously guided by the substantial chance of another person's death (tacit knowledge) or that D would have been explicitly or tacitly aware of the substantial chance if he had attended properly to his driving (latent knowledge).[88] In this view, non-conscious knowledge (tacit or latent knowledge) is sufficient to fulfil the cognitive element.

9.4.3 *The Volitional Element: Actual What-If Desires, Counterfactual What-If Desires or Crypto-Cognitivism?*

Introduction

To explain the Porsche case according to the volitionist theory, one has to argue that this case can be characterized as 'knowing' and 'not wanting'. In the preceding section, I explained how the cognitive element might be fulfilled. In this section, I discuss three ways in which the volitional element can be negated: actual what-if desires, counterfactual what-if desires and crypto-cognitivism. These criteria are to function independently of the cognitive element so as to create an exclusive volitionist distinction between intent and negligence.

Actual What-If Desires

This approach holds that the volitional element depends on the answer to a hypothetical question the actor posed to himself: would I act if I had been certain about causing another person's death? This criterion can be traced back to a formula devised by the German scholar Frank.[89] The aim of Frank's formula is to establish that it was immaterial to the actor's will formation (*Willensbildung*) whether the

87 I do not necessarily buy into this distinction, but that is not pertinent to the argument.

88 It is noted that attributing tacit knowledge is problematic in the Porsche case, because one would have to argue that D was also subconsciously guided by the knowledge of a significant chance of his own death.

89 Frank 1931, p. 190. This view is defended by Remmelink (*see* Section 9.2.5).

consequence was imagined as *certain* or only as *possible*. In that case, the person can be blamed to the same extent as someone acting with oblique intent: the certainty of a consequence provides no reason to refrain from acting.

It is possible to apply this criterion to the Porsche case. It must then be held that D actually contemplated that he would not act if the death of another person were certain. As was explained in Section 9.3.8, this does not seem all that plausible. Why would someone speculate about the desirability of a course of action involving the death of another person if he does not even imagine or expect a collision?

Counterfactual What-If Desires

This approach holds that the volitional element depends on the answer to the question whether the actor would have acted if he had been certain about the consequence. This counterfactual criterion can be traced back to another formula by Frank.

> How would the perpetrator have behaved with certain knowledge of the offence elements? [...] If one comes to the conclusion that the perpetrator would also have acted with certain knowledge, [...] then intent is to be affirmed; if one comes to the conclusion that he would have refrained from the act, then intent is to be rejected.[90]

According to this formula, the volitional element involves a prediction about how the actor would have acted in a counterfactual state of mind. Frank urges that the answer should not just depend on the actor's character; it should depend primarily on how he positions himself with respect to his specific goal.

Frank's formula could be utilized on the basis of Desirability Maximization Theory. The theory holds that the desirability of a possibility is determined by multiplying the conviction grade by the appreciation grade. Thus, the lower the conviction grade, the less influence is exerted by the appreciation grade. Frank's formula basically requires one to set the conviction grade to 1, thus attaching all the importance to the appreciation grade with respect to the possibility.

Let us once again take the example of D facing the option of escaping or not escaping when driving towards a police officer.[91] Let us assume that D has a conviction grade of 0.01 with regard to killing the officer. That means that the desirability of this possibility is 100 times lower than the appreciation grade, so that it exerts relatively little influence on decision making. Table 9.10 contains the desirabilities as to killing the officer for the conviction grades of 0.01 and 1 with respect to three widely different appreciation grades.

90 Frank 1931, p. 190.
91 *See* Section 9.3.7.

Table 9.10 Influence of Conviction on Desirability

Desirability at C = 0.01	Desirability at C = 1	Change in desirability
0.01 × -50 = -0.5	1 × -50 = -50	-49.5
0.01 × 0 = 0	1 × 0 = 0	0
0.01 × 50 = 0.5	1 × 50 = 50	+49.5

The starting point of Frank's formula is that D did actually act despite the conviction grade of 0.01 as to killing the officer. The question to be answered is whether this would be different if she had been certain. In that case, there are only two simple options left: escaping by killing the officer and not escaping by stopping the car.[92] Thus, D would act under certainty if the desirability of escaping by killing the officer is higher than the desirability of not escaping.

In the first example (an appreciation grade of -50), this would generally not be the case. Certainty as to death greatly decreases (-49.5) the desirability of the option of escaping.[93] This can only be outweighed if the option of not escaping has a very negative desirability. In the second example (an appreciation grade of 0), D would act in case of certainty, since the possibility of death has no influence on the desirability of escaping. In the third example (an appreciation grade of 50), D would also act in case of certainty, because the desirability of escaping greatly increases (+49.5) in comparison to the actual situation.

Desirability Maximization Theory shows that cognition exerts a tremendous influence on decision making. In the example case, the desirability is changed with a factor 100 in case of non-zero appreciation grades. Frank's formula removes this cognitive factor from the moral assessment. Criminal responsibility for an intentional offence is made largely dependent on the appreciation grade with respect to the result.

Let us now apply Desirability Maximization Theory to the Porsche case. Since certainty as to another person's death is connected to a high probability of one's own death, one can be fairly confident that D would not have acted had he been certain. The high conviction grade leads to a very negative desirability for the option of overtaking.

Against this use of Frank's formula, one could argue that D would refrain from his act for the wrong reasons. A more demanding version of the criterion might ask whether D would have acted if the only pertinent consequence under consideration was another person's death.[94] This criterion relates more directly to what needs to be established: indifference with regard to another person's death.

Actual what-if desires (preceding section) and counterfactual what-if desires (this section) are both methods to gauge indifference. In the first criterion, indifference depends on a prediction of behaviour by the actor himself. In the second criterion, indifference depends on a prediction of behaviour by an outside observer.

92 The possibility of escaping without killing V seizes to be part of the option of escaping.

93 The desirability of the combined prospect of escaping *and* killing V is less negative than -50, since the sole possibility of escaping is positively appreciated.

94 *E.g.* a successful overtaking manoeuvre by D, whereas V would be killed by an evasive manoeuvre.

Since it is not all that likely that people actually pose what-if questions to themselves when acting, the second criterion appears to be most useful in practice.

Crypto-Cognitivism

This approach entails that the *volitional* element is gauged by reference to *cognitive* mental states. In this approach, one purports to say something about volitions or the absence thereof whilst actually saying something about cognitions or the absence thereof. This interpretation takes as a starting point the Supreme Court's phrase that the overtaking manoeuvre "in the defendant's imagination and expectation would not result in a collision". Since this cognitive depiction has not yet been used to negate the cognitive element, it is still possible to use it at the volitional stage. There are three ways to argue that the volitional element is not fulfilled.

1. D was (almost) fully *convinced* that V would *not die*.
2. D was (almost) fully *unconvinced* that V would *die*.
3. D did not consider V's death.

The first two options refer to an explicit mental state. The first option closely resembles the Supreme Court's depiction: the mental object is about V *not dying*. In the second option, the mental object is about V *dying*. The third option refers to the absence of an explicit mental state. The possibility of V's death is not considered at all.

Crypto-cognitivism involves the use of cognitive mental terms to delineate the volitional element. This raises the question of how we can distinguish cognitive from volitional mental states. The philosopher of mind Kenny gives a useful characterization of both mental states.

> Among the characterizations we may assign to human mental states and actions, there are two which stand out as the most important. We may characterize certain states as true (or false); we may characterize others as good (or evil). Beliefs, most obviously, may be described as true or false; desires, most obviously, may be described as good or evil. Those states and activities which can be evaluated on the true/false scale belong to the cognitive side of the soul; those states and activities which are evaluated on the good/evil scale belong to the affective, volitional side of the soul. At the highest level, the truth-bearing (or falseness-bearing) items are actualizations of the intellect; the goodness-bearing (or badness-bearing) items are actualizations of the will.[95]

Searle, another philosopher of mind, points out that it is part of the definition of 'belief' that beliefs are candidates for truth or falsity.[96] Since this truth-candidacy

95 Kenny 2001, pp. 74-75. *See also* Kenny 1978, p. 46: "Affective states of mind are neither true nor false but consist in an attitude of pursuit or avoidance: such things as purpose, intention, desire, volition."

96 Searle 1992, p. 62.

characteristic is part of the definition, it is not open to empirical verification or falsification. In his article about knowledge and belief in the criminal law, Shute suggests that this truth-candidacy characteristic can function as some kind of test. "It helps distinguish beliefs from other 'non-cognitive' psychological states, such as 'desire', 'hope', 'want', or 'care', which are neither true nor false but characteristically reflect a person's attitude to a given state of affairs."[97]

Let us apply the truth-candidacy test to the Supreme Court's phrase that the overtaking manoeuvre "in the defendant's imagination and expectation would not result in a collision". The nouns 'imagination' and 'expectation' clearly refer to mental states that can become true or false in the future. If these terms are indeed used to delineate the volitional element, this surely qualifies as crypto-cognitivism.

9.4.4 The Most Likely Volitionist Explanation of Conscious Negligence

The volitionist theory holds that conscious negligence can be characterized as a combination of 'knowing' and 'not wanting'. I have discussed three ways to fulfil the cognitive element and three ways to negate the volitional element. Table 9.11 shows that there might be nine volitionist explanations of conscious negligence.

Table 9.11 Volitionist Explanations of Conscious Negligence

Cognitive element	**Volitional element**		
	Actual what-if desires	Counterfactual what-if desires	Crypto-cognitivism
Prior awareness	x	x	x
Minor awareness	x	x	x
Non-conscious awareness	x	x	x

The question is whether one of these combinations can explain the view of the Dutch Supreme Court. The passages quoted below contain relevant information about the delineation of conscious negligence. The first passage is from the Porsche case and the second passage is from the HIV I case. The latter passage, which is often referred to by lower courts and advisory opinions by the advocate general, contains the most elaborate exposition of the Supreme Court's view.

> *Porsche*
> [Conditional intent to kill is present in case of very dangerous traffic behaviour if the defendant] instead of counting on a good outcome, consciously accepts and takes for granted the substantial chance that others will die as a result of his conduct.[98]

> *HIV I*
> [To establish conditional intent] it is not only required that the defendant has knowledge of the substantial chance that the result will occur, but also that he consciously

97 Shute 2002, p. 183.
98 Supreme Court 15 October 1996, ECLI:NL:HR:1996:ZD0139.

> accepted (took for granted) that chance at the time of his act. From the mere fact that this knowledge is present [...] it cannot necessarily be inferred that he consciously accepted the substantial chance of the result, because in case of that knowledge conscious negligence might also be adopted. Of someone who has knowledge of a substantial chance of the result, but who [...] assumed that the result would not occur, it can be said that he acted with (gross) inadvertence but it cannot be said that [he acted with conditional intent].[99]

In the latter passage, the Supreme Court explicitly states that knowledge can both be present in conditional intent and conscious negligence. This can be construed as a rejection of the cognitivist theory and an endorsement of the volitionist theory. This raises the question of how the cognitive and volitional element are to be interpreted in the eyes of the Supreme Court.

I start with the volitional element. It seems that crypto-cognitivism is the most promising candidate. The Supreme Court has never given any indication that actual or counterfactual what-if desires might be relevant to the interpretation of intent. This is different, however, with respect to crypto-cognitivism. Both the Porsche case and the HIV I case provide evidence that the Supreme Court is suffering from crypto-cognitivism.

In the Porsche case, the Supreme Court distinguished conscious negligence from conditional intent by contrasting 'counting on a good outcome' (negligence) with 'consciously accepting a substantial chance' (intent). In the HIV I case, the Supreme Court contrasted 'assuming that the result would not occur' (negligence) with 'consciously accepting a substantial chance' (intent). If we apply the truth-candidacy test to the verbs 'counting on' and 'assuming', it is clear that they are cognitive verbs: they refer to mental states that can become true or false. Since the Supreme Court employs these verbs to delineate the volitional element, the Court appears to have fallen prey to crypto-cognitivism. This also means that the final conclusion of the Porsche case, i.e. that overtaking "in the defendant's imagination and expectation would not result in a collision", may well have been intended to pertain to the volitional element as well.

The next question is which approach best explains the cognitive element. The first approach (prior awareness) cannot be ruled out. The Supreme Court holds that conscious negligence is present if "someone who has knowledge of a substantial chance of the result [...] assumed that the result would not occur". This might be explained by the convergence theory, i.e. the graded judgment (knowledge of a substantial chance) is converted by the actor into a dichotomous judgment (the result will not occur) before making a decision. Although this approach can explain the Supreme Court's wording, the lack of explicit endorsement speaks against this interpretation. It would seem that invoking such a distinct psychological theory is in need of explicit endorsement.

The second approach (minor awareness) should probably be rejected. The Supreme Court has consistently held that conditional intent requires that D "has

99 Supreme Court 25 March 2003, ECLI:NL:HR:2003:AE9049.

knowledge of the substantial chance that the result will occur".[100] It seems, therefore, that awareness of only a non-substantial chance is not sufficient for the cognitive element.

In my view, the third approach (non-conscious awareness) offers the most probable explanation of the cognitive element.[101] When the Supreme Court contrasts conditional intent with conscious negligence, it uses the term 'knowledge' (*wetenschap*). In common parlance, this term often refers to knowledge of a non-conscious nature (tacit or latent knowledge). It is possible to interpret the cognitive element like this. Although D is not explicitly (consciously) aware of the substantial chance at the time of the *actus reus*, the cognitive element is nonetheless fulfilled because D knows in a latent or tacit sense that there is a substantial chance of the result.

Of the nine volitionist explanations of conscious negligence, the combination of non-conscious awareness (cognitive element) and crypto-cognitivism (volitional element) is the most likely. This leads to the following explanation of the Porsche case. The cognitive element is fulfilled, because D knows in a latent or tacit sense that there is a substantial chance of V's death. The volitional element is negated, because D did not expect V to die.

9.4.5 Does Crypto-Cognitivism Lead to the Same Outcome as Real Cognitivism?

In this section, I want to address the question of whether the real cognitivist interpretation of intent leads to the same outcome as the crypto-cognitivist interpretation. In the real cognitivist interpretation, the absence of *conscious* (explicit) awareness of a substantial chance negates the cognitive element.[102] In the crypto-cognitivist interpretation, 'counting on a good outcome' or 'assuming that the result would not occur' negates the volitional element. I take it that these phrases refer to *conscious* (explicit) knowledge as well.[103] The question to be answered now is whether these cognitive delineations have exactly the same meaning.

On the face of it, there are two differences. First, the real cognitivist criterion pertains to the *prohibited result*, whereas the crypto-cognitivist criterion pertains to the *absence of the prohibited result*. Second, the real cognitivist criterion refers to a *conviction grade* (substantial chance), whereas the crypto-cognitivist criterion seems to refer to a *full conviction* (counting on; assuming).

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100 *See* Supreme Court 25 March 2003, ECLI:NL:HR:2003:AE9049 (*HIV I*). *But see* Blomsma 2012, p. 114, *inter alia* referring to the same case: "It seems *dolus eventualis* requires that defendant must be aware of *a* chance. This chance must also be considerable, but this is established objectively: the defendant need not be aware of this." *See further* the extended contribution (Van Dijk forthcoming) about the difference between objective and subjective probability.

101 *See* Van Dijk 2008, pp. 425-426.

102 In this and the following section, I denote the cognitivist interpretation of the cognitive element as 'conscious awareness' (i.e. *explicit* awareness) so as to contrast it to the 'non-conscious awareness' that suffices in the volitionist interpretation of the cognitive element.

103 If this were not the case, it is difficult to explain how the cognitive element can be fulfilled (knowledge of a substantial chance of the result), whilst the volitional element is not fulfilled (assumed that the result would not occur). If the cognitive element refers to non-conscious knowledge, whilst the volitional element refers to conscious knowledge, there is no contradiction.

To make for easier comparison, I propose to compare both criteria on the same dimension, i.e. a conviction grade with regard to the prohibited result. The question becomes thus as follows: does conviction grade *x* qualify as intent according to the real cognitivist or the crypto-cognitivist interpretation? That leaves the question of how 'counting on a good outcome' or 'assuming that the result would not occur' should be converted. Strictly speaking, these phrases should be converted into a conviction grade of 0 as to the prohibited result. However, in common parlance phrases like 'assuming that not-Φ' or 'not assuming that Φ' might also refer to conviction grades slightly above 0.[104] It is acceptable to say 'I do not expect it to rain' if one is aware of a slight chance of rain.

The real cognitivist and the crypto-cognitivist criterion might lead to a different outcome. These differences are connected to the fact that it is unclear what conviction grade (*x*) is minimally required to qualify as a 'substantial chance'.[105] I address two potential differences.

First difference. It may be that a mental state which can only just be regarded as 'conscious awareness of a substantial chance that Φ' (a conviction grade of *x*) can also be described as 'assuming that not-Φ'. This is especially possible if a low probability suffices for a 'substantial chance' (e.g. $x = 5\%$). Assume that D has a conviction grade of 0.05. The real cognitivist interpretation classifies this as intent, because D acted despite conscious awareness of a substantial chance. The crypto-cognitivist interpretation, however, might classify this as conscious negligence. The cognitive element might be fulfilled on account of non-conscious awareness of a substantial chance. The volitional element might be negated, because a conviction grade of 0.05 is low enough to say that D assumed that the result would not occur.

Second difference. It may be that a mental state which falls just short of 'conscious awareness of a substantial chance that Φ' (a conviction grade of $< x$) cannot be described as 'assuming that not-Φ'. This is especially possible if a relatively high probability is required for a 'substantial chance' (e.g. $x = 60\%$). Assume that D has a conviction grade of 0.59. The real cognitivist interpretation classifies this as conscious negligence, because D did not act whilst being consciously aware of a substantial chance. The crypto-cognitivist interpretation, however, might classify this as intent. The cognitive element might be fulfilled on account of non-conscious awareness of a substantial chance. The volitional element might not be negated, because a conviction grade of 0.59 is too high to say that D assumed that the result would not occur.

This is theory. In practice, it would appear to be extremely difficult to make such nuanced distinctions. Absent any guidance from the Supreme Court, I think it best to assume that there is no gap between the real cognitivist and the crypto-cognitivist interpretation. Thus, 'conscious awareness of a substantial chance that Φ' never leads to the classification 'assuming that not-Φ' and 'conscious awareness of a non-substantial chance that Φ' always leads to the classification

104 The same occurs in the higher regions. Legal terms like 'knowingly' (oblique intent) are usually taken to refer to 'virtual certainty'. *See* Blomsma 2012, pp. 72-73.

105 *See* Section 9.2.6.

'assuming that not-Φ'. According to this analysis, both the real cognitivist and the crypto-cognitivist interpretation of conscious negligence lead to the same result.[106] In both cases, the absence of conscious awareness of a substantial chance results in the negation of intent. It is either classified as 'not knowing' or as 'not wanting'.

9.4.6 How Did the Cognitive Boundary Come About?

Introduction

In this section, I want to address the question of why the Supreme Court might have opted for the combination of non-conscious awareness (cognitive element) and crypto-cognitivism (volitional element). I put forward two hypotheses. The first hypothesis is that the Court tried to reconcile a truly cognitivist interpretation with an exclusive volitionist distinction. The second hypothesis is that the Court failed to accurately translate the more volitional terms that are employed in German case law.

First Hypothesis: Torn between Two Theories

The first hypothesis is that the Supreme Court wants to hold on to an exclusive volitionist boundary between intent and negligence, although it does not want a truly volitional boundary. To explain this, it is useful to briefly reiterate why 'knowing' implies 'wanting' according to the cognitivist theory.[107]

The dependency thesis can be explained on the basis of Desirability Maximization Theory. According to this theory, the substantial chance of a result is part of an option that is more desirable than (or at least as desirable as) any other option open to the actor. The fact that there is no option available to the actor with a higher desirability necessarily qualifies as 'wanting'. Of course, the actor could hope for the result not to happen, but since this hope does not induce the actor to choose otherwise, this is not enough to qualify it as 'not wanting'. In the volitionist theory, however, there can be a divergence between 'knowing' and 'wanting'. This can be illustrated as follows.

1. D is consciously aware of a substantial chance that option A will bring about Φ.
2. D chooses option A.
3. However, the volitional element with respect to Φ is not fulfilled.

A truly volitional way to achieve this result is by focussing directly on the appreciation grade with respect to the result. Assume that D drives towards a police officer despite foreseeing the substantial chance that the officer will be killed. She very much hopes that the officer will not be killed, which is manifested by a very negative appreciation grade as to that possibility. The volitional element is negated on account of the negative appreciation grade with respect to killing that officer. This result might also be achieved on the basis of Frank's formula with respect to

106 It is noted that the cognitive element of the volitionist interpretation (non-conscious awareness of a substantial chance) is not likely to lead to differences.

107 *See* Section 9.3.7.

counterfactual what-if desires. If the possibility of death is very negatively appreciated, this can only be outweighed if the alternative option (e.g. not escaping) has a very negative desirability.[108] Thus, D would probably not act under certainty.

It might be that the Supreme Court is torn between the two theories. On the one hand, it agrees with the cognitivists that hoping without acting upon it should not negate intent. On the other hand, it wants to maintain an exclusive volitionist distinction between intent and negligence. This leads to a difficult situation. It is not possible to have a 'hopeless' distinction between intent and negligence if conscious awareness of a substantial chance functions as criterion for the cognitive element. The combination of non-conscious awareness and crypto-cognitivism provides a way out. If *non-conscious awareness* of a substantial chance functions as the criterion for the cognitive element, it is still possible to use *conscious awareness* as a criterion for the volitional element. This entails that the difference between intent and negligence can still revolve exclusively around the volitional element. Conscious awareness of a substantial chance is categorized as 'wanting', whereas the absence thereof is categorized as 'not wanting'.

Second Hypothesis: Lost in Translation

There is an alternative explanation, however. This explanation entails that the Supreme Court actually intended to address volitional issues when using cognitive terms.

Machielse, a close observer of the Supreme Court, puts forward that the terminology used in the Porsche case is probably inspired by German case law.[109] It is interesting to take a closer look at this likely source of inspiration. In the case law in question, the German Federal Court of Justice defined conscious negligence as 'not agreeing with the result, which is recognized as possible'. This is specified as 'trusting in the non-occurrence of the result' and 'seriously – and not just vaguely – trusting in the non-occurrence of the result'.[110]

Two points are worth mentioning. First, the German Court actually defined conscious negligence in volitional terms (not agreeing). Second, the verb used to specify this condition (trusting) is more volitional in nature than the verbs used by the Dutch Supreme Court. 'Seriously trusting' is both cognitive and volitional: it involves an expectation of a state of affairs *and* a judgment of the state of affairs as good.[111]

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108 *See* Section 9.4.3.

109 *See* Machielse 2013, note 3.3 on 'opzet', referring to Federal Court of Justice 20 November 1986, NStZ 1987, 362. Machielse is a Professor of Criminal Law and has been an advocate general of the Supreme Court since 1996.

110 *See* Federal Court of Justice 20 November 1986, NStZ 1987, 362: "daß der bewußt fahrlässig Handelnde mit der als möglich erkannten Folge nicht einverstanden ist und deshalb auf ihren Nichteintritt vertraut" and "[sie kann] ernsthaft und nicht nur vage darauf vertraut haben, den W [...] nicht zu verletzen". *See also* Federal Court of Justice 22 March 2012, NStZ 2012, 384: "wenn er trotz erkannter objektiver Gefährlichkeit der Tat ernsthaft und nicht nur vage auf ein Ausbleiben des tödlichen Erfolges vertraut (Fehlen des Willenselements)."

111 *See* Kenny 1978, p. 46. A German thesaurus lists both '*erwarten*' (expecting) and '*erhoffen*' (hoping) as synonyms for '*vertrauen auf*' (trusting in). *See* <www.synonyme.woxikon.de/synonyme>.

It cannot be excluded that the German volitional demarcation somehow got lost in translation. In this view, the Dutch Supreme Court neglected to use a volitional term like 'not agreeing' when defining conscious negligence in the Porsche case and substituted the mixed term 'trusting in' for the more cognitive term 'counting on'. This was operationalized with the cognitive terms 'imagination' and 'expectation'. Finally, in the HIV I case, the Supreme Court employed the completely cognitive term 'assuming' to define conscious negligence.

If this hypothesis is true, terms like 'counting on' (*erop rekenen*), 'imagination' (*voorstelling*), 'expectation' (*verwachting*) and 'assuming' (*ervan uitgaan*) were meant to be interpreted in a more volitional way. In this interpretation, not all beliefs in the non-occurrence of the result negate the volitional element. Expecting the non-occurrence of a result one really wants to avoid would negate the volitional element. The abovementioned example, in which D drives towards a police officer whilst hoping the officer will survive, might provide an example. However, expecting the non-occurrence of a result one is indifferent about – e.g. an appreciation grade of 0 as to V's death – might still be regarded as intent.

It is noted that transplanting a German criterion to the Dutch system is not without difficulties. In Dutch law, the cognitive element pertains to a 'substantial chance'. In German law, however, the cognitive element pertains to a prospect which is "possible and not entirely far-fetched".[112] Let us assume, *arguendo*, that in German law a conviction grade of 0.01 (1%) suffices, whereas in Dutch law a conviction grade of 0.10 (10%) is required. It would appear that acting despite believing there is a 1% chance of causing an evil result is less blameworthy than acting despite believing there is a 10% chance of causing an evil result (*ceteris paribus*).[113] It may well be that acting despite a 0.01 conviction grade is not regarded as blameworthy enough by itself to qualify as intent. Therefore, something more in the way of volition is required. This reasoning is less convincing in the Netherlands. It is difficult to fathom how acting despite a 0.10 conviction grade of causing an evil result could not meet the blameworthiness threshold. This is even more so if a 'substantial chance' would require a higher subjective probability than 10%.[114]

What if the 'shared intentions' of past or present Supreme Court judges are best described as aspiring to a truly volitional boundary?[115] Should the conclusion of Section 9.4.5, i.e. the real cognitivist and the crypto-cognitivist interpretation probably lead to the same outcome, be revised? I would argue against that for two reasons. First, the use of cognitive terms all but obliges the interpreter to assume a cognitive boundary between intent and negligence. The presumed intention of the Court should have little bearing on the interpretation of the words used to define

112 *See*, *e.g.*, Federal Court of Justice 22 March 2012, NStZ 2012, 384: "Bedingt vorsätzliches Handeln setzt nach ständiger Rechtsprechung des Bundesgerichtshofs voraus, dass der Täter den Eintritt des tatbestandlichen Erfolges als möglich und nicht ganz fernliegend erkennt".

113 The interpretation of intent is only related to *prima facie* blameworthiness, since justifications and excuses do not negate intent. This is why the comparison pertains to an evil result.

114 The term 'substantial' certainly seems to point in that direction. *See*, *e.g.*, Lichtenstein & Newman 1967.

115 *See* Marmor 1992, pp. 159-165, about 'shared intentions'.

intent. Second, as was explained above, a truly volitional boundary is less viable in a system where a substantial chance is required for the cognitive element.

9.4.7 Conclusion: Beyond Humpty Dumpty

> I maintain that any writer of a book is fully authorised in attaching any meaning he likes to any word or phrase he intends to use. If I find an author saying, at the beginning of his book, 'Let it be understood that by the word *black* I shall always mean *white*, and that by the word *white* I shall always mean *black*,' I meekly accept his ruling, however injudicious I may think it.[116] – Lewis Carroll

Lewis Carroll was not only a writer but also a logician. This epigraph comes from a book about logic. In his literary work, Carroll created the egg-shaped character Humpty Dumpty, who at one point said: "When *I* use a word [...] it means just what I choose it to mean – neither more nor less."[117] Labelling a cognitive boundary as volitional or employing cognitive terms to express a volitional boundary is like using 'black' to mean 'white' and 'white' to mean 'black'. The legal concept of intent – on any interpretation – already has a meaning that differs considerably from common parlance. It is up to the Supreme Court, legal scholars and teachers to explain the concept to legal practitioners, students and citizens. There may be good reasons to attribute an extraordinary meaning to the legal concept of intent.[118] There is no justification, however, for attaching an extraordinary meaning to terms used to explain this concept.

This leads to a simple piece of advice. If the Supreme Court agrees with the cognitivist theory, it should not classify the boundary as volitional. Using the wrong label is liable to cause confusion and pointless academic debate. If the Supreme Court agrees with the volitionist theory, however, it should not use cognitive terms to mark the boundary. This is liable to result in an unintended interpretation of intent.

9.5 Final Conclusion

In the prolegomenon, I submitted that there is great disparity in the way in which comparable cases of extremely dangerous traffic behaviour are handled by different lower courts. One and the same case might just as well lead to a conviction as to an acquittal for (attempted) intentional homicide, depending on the court that handles the case. Generally, the one outcome is just as 'cassation proof' as the other outcome. There is a large cassation free zone, which is outside the reach

116 Carroll 1958, p. 166.
117 Carroll 1971, p. 190.
118 Attaching a meaning to intent that is much wider than the plain meaning of the term need not conflict with the legality principle. In order to guide behaviour, citizens generally do not have to know how intent is interpreted. *Mens rea* terms are primarily directed at judges. *See* Robinson 2005 about fair adjudication.

of the Supreme Court. It is submitted that the facts and circumstances of the Porsche case also fall in this cassation free zone. The facts and circumstances of the Porsche case might be presented in such a way that the Supreme Court would not quash a conviction.

The disparity in Dutch criminal law can be explained in two different ways. First, courts may entertain a different interpretation of substantive law. Second, courts may assess facts and circumstances of a case in a different way. Variance between court decisions and error of court decisions could be reduced if it were clear how intent should be interpreted and what rules of inference should be used to assess the presence of intent. The present contribution allows for two conclusions in that respect. First, intent should be interpreted in a cognitive way. Second, Desirability Maximization Theory might be used to assess whether intent has been present. Taken together, these conclusions lead to a simple rule of thumb for the lower courts: do not convict of (attempted) intentional homicide in traffic cases. This will be explained in a general way below.

To assess intent according to a cognitivist interpretation, a relatively straightforward question must be answered: did D act despite conscious awareness of the substantial chance of the result? This question can be answered on the basis of Desirability Maximization Theory. The theory predicts that homicidal intent in traffic cases can only be proved in highly exceptional circumstances.

The implausibility of homicidal intent in Porsche-like cases depends on the tight connection between the required mental state (awareness of a substantial chance of V's death) and a mental state with extreme negative desirability (a significant chance of D's own death). Multiplication of the conviction grade (significant chance) by the extremely negative appreciation grade would lead to a negative desirability that is unlikely to be outweighed by the positive desirability of a successful overtaking manoeuvre. Thus, both intent to kill oneself and intent to kill others cannot be explained by Desirability Maximization Theory.

Obviously, the prospect of one's own death would provide a strong incentive to avoid a collision. But one's own death is by no means the only negative collateral consequence associated with a collision. The most important negative consequences are listed below. These consequences would as a rule be appreciated very negatively.

1. Killing or injuring oneself
2. Damaging one's vehicle
3. Termination of one's journey
4. Criminal or civil liability
5. Killing or injuring loved ones
6. Killing or injuring unknown others

It seems obvious that the prospects of injuring oneself, damaging one's vehicle, the termination of one's journey and legal liability would also provide strong incentives to avoid a collision. These are all selfish incentives, thus keeping within the spirit of the Porsche case.

The fifth prospect, killing or injuring loved ones, is more altruistic in nature. In some court cases, the possibility of killing others is connected to the possibility of killing or injuring loved ones. In one case, D braked forcefully whilst he was being tailgated at a speed of over 100 km/h.[119] He had told his girlfriend to buckle up because he was going to have to step on the brakes. The other car swerved to the left in response to the braking manoeuvre and collided with a tree. D was convicted of intentional homicide. This example is indicative for cases where a collision is not only dangerous for oneself but for loved ones as well. It is difficult to see how awareness of the substantial chance of V's death cannot be accompanied by awareness of lethal danger for D and his girlfriend. How can this daunting prospect be outweighed by whatever motive drove D to brake (e.g. spooking V)?

The sixth prospect, killing or injuring unknown others, is completely altruistic in nature. In many non-traffic cases, there is some animosity between D and V that might explain D's behaviour. In most traffic cases, however, V is completely unknown to D. For most people, the prospect of killing or injuring unknown others would be very undesirable indeed. German doctrine has a special rule that pertains to killing other people. The so-called *Hemmschwellentheorie* holds that there is a high psychological threshold with respect to killing fellow humans.[120] In a 2010 decision, the German Federal Court of Justice stated the following.

> Because of the high inhibition threshold with respect to killing, one must always consider the possibility that the perpetrator did not recognize the risk of killing or at least trusted that such a result would not occur.[121]

Recently, the Federal Court has downplayed the value of the threshold theory.[122] The Court made clear that the theory is not to function as an empty catchphrase. That does not alter the fact, however, that the theory, if you want to call it that, appeals to a very commonsensical assumption. The prospect that certain conduct might lead to the death of a fellow human would generally provide a strong incentive to abstain from that conduct. The same goes – to a lesser extent – for the prospect of injuring someone else. In my opinion, courts should not assume too easily that a driver's self-serving motives (e.g. reaching one's destination quickly) would outweigh the substantial chance of causing another human's death.

Quite a few convictions of (attempted) intentional homicide in the Netherlands are characterized by inequality of risk for D and V.[123] This occurs, *inter alia*, when dangerous road traffic behaviour results in a collision with a pedestrian or a bicyclist. Such a collision is much more dangerous for V than for D. The reasoning in these cases seems to be that the vulnerability of V sets it completely apart from Porsche-like cases. Due to the relative invulnerability of D, conscious acceptance

119 Supreme Court 20 January 2004, ECLI:NL:HR:2004:AM2526.

120 *See* Blomsma 2012, pp. 120-134; Puppe 2012; Goeckenjan, this book, Section 5.4.1.

121 Federal Court of Justice 2 February 2010, NStZ 2010, 511.

122 Federal Court of Justice 22 March 2012, NStZ 2012, 384. *See*, *e.g.*, Fahl 2013, proclaiming the end of the theory.

123 *See*, *e.g.*, Supreme Court 23 January 2001, ECLI:NL:HR:2001:AA9594; Supreme Court 17 February 2004, ECLI:NL:HR:2004:AN9360.

of V's death is perfectly compatible with not foreseeing and not accepting one's own death.

This reasoning is misguided in two ways. First, in many cases D might just as well have collided with a much more risky object such as a car or a tree. Second, the remaining collateral consequences of a collision, which were elaborated upon above, would also provide a very strong incentive to avoid a collision. Collision awareness is generally hard to reconcile with Desirability Maximization Theory. This collision-avoidance assumption, which is only slightly easier to rebut than the Porsche case's self-preservation assumption, deserves to be taken seriously as well.

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